DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-158	*** CAPITAL CASE ***
Title:	Billy Joe Magwood, Petitioner v. Tony Patterson, Warden, et al.
Docketed:	August 7, 2009
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(07-12208)
Decision Date:	January 23, 2009
Rehearing Denied:	March 24, 2009
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 10 2009	Application (08A1116) to extend the time to file a petition for a writ of certiorari from June 22, 2009 to August 7, 2009, submitted to Justice Thomas.
Jun 15 2009	Application (08A1116) granted by Justice Thomas extending the time to file until August 7, 2009.
Aug 4 2009	Petition for a writ of certiorari filed. (Response due September 8, 2009)
Sep 9 2009	Order extending time to file response to petition to and including October 8, 2009.
Oct 8 2009	Brief of respondent Grantt Culliver, Warden in opposition filed.
Oct 21 2009	DISTRIBUTED for Conference of November 6, 2009.
Oct 21 2009	Reply of petitioner Billy Joe Magwood filed. (Distributed)
Nov 9 2009	DISTRIBUTED for Conference of November 13, 2009.
Nov 16 2009	Petition GRANTED limited to Question 1 presented by the petition.
Nov 23 2009	Motion to appoint counsel filed by petitioner Billy Joe Magwood.
Nov 23 2009	Motion for leave to proceed further herein in forma pauperis filed by petitioner Billy Joe Magwood.
Dec 2 2009	Motion DISTRIBUTED for Conference of January 8, 2010.
Dec 17 2009	Motion to dispense with printing the joint appendix filed by petitioner Billy Joe Magwood.
Dec 22 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 4, 2010.
Dec 29 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents in this case.
Jan 4 2010	SET FOR ARGUMENT ON Wednesday, March 24, 2010.
Jan 4 2010	Brief of petitioner Billy Joe Magwood filed.

Jan 11 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 11 2010	Motion for leave to proceed in forma pauperis filed by petitioner GRANTED.
Jan 11 2010	Motion to appoint counsel filed by petitioner GRANTED. Jeffrey L. Fisher, Esquire, of Stanford, California, is appointed to serve as counsel for the petitioner in this case.
Jan 11 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jan 22 2010	CIRCULATED.
Feb 2 2010	Record from U.S.C.A. for 11th Circuit is electronic.
Feb 3 2010	Brief of respondents Tony Patterson, Warden, et al. filed. (Distributed)
Feb 4 2010	Record from U.S.D.C. for Middle District of Alabama. (2 boxes)
Feb 4 2010	Additional record received from U.S.C.A. for 11th Circuit. (1 envelope)
Feb 10 2010	Brief amici curiae of South Carolina, et al. filed. (Distributed)
Mar 3 2010	Additional Record received from U.S.D.C. for Middle District of Alabama. (1 box) There are sealed documents in this case.
Mar 5 2010	Reply of petitioner Billy Joe Magwood filed. (Distributed)
Mar 24 2010	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. (Appointed by this Court.) For respondents: Corey L. Maze, Solicitor General, Montgomery, Ala.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-09-158

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IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

GRANTT CULLIVER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a "second or successive" claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

2. Did petitioner's attorney provide ineffective assistance of counsel warranting federal habeas relief by failing to raise an argument at petitioner's resentencing proceedings that would have made clear that petitioner was constitutionally ineligible for the death penalty?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Billy Joe Magwood respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 555 F.3d 968. The pertinent opinion of the United States District Court for the Middle District of Alabama (Pet App. 23a) is published at 481 F. Supp. 2d 1262.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2009. Pet. App. 1a. A timely petition for rehearing was denied on March 24, 2009. Pet. App. 100a-101a. On June 15, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 7, 2009. *See* 08-A1116. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall

any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2244(b) provides in relevant part:

"(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Relevant provisions of Alabama's statutes governing capital punishment are reproduced at Pet. App. 91a-99a.

STATEMENT OF THE CASE

Petitioner Billy Joe Magwood stands sentenced to death for an act that was not a capital offense under Alabama law when he committed it. A federal district court therefore granted habeas relief from this sentence on two independent grounds: (1) that the Alabama courts violated the Due Process Clause by unforeseeably changing Alabama law in order to retroactively render petitioner's act a capital offense; and (2) that petitioner's attorney rendered ineffective assistance of counsel by failing to raise this due process claim at petitioner's resentencing proceeding. Without disputing that the retroactive alteration of Alabama law to render petitioner death-eligible clearly violated the Due Process Clause, the Eleventh Circuit reversed the district court's decision and reinstated petitioner's death sentence. The Eleventh Circuit held that (1) petitioner's due process claim is "successive" and thus procedurally barred, even though this is his first habeas petition challenging his new sentence, because petitioner could have challenged his original sentence on the same constitutional ground; and (2) petitioner's attorney reasonably neglected to argue at petitioner's resentencing that the Due Process Clause forbade retroactively rendering petitioner's offense a capital crime.

1. Petitioner has long suffered from paranoid schizophrenia. His service in the Vietnam War and a subsequent period of detention in the Coffee County, Alabama jail, during which he was unable to obtain medication or treatment, deepened his mental illness. By the late 1970's, petitioner believed that the Army was sending him orders through surgically implanted

communication devices and warning him that Coffee County authorities, including Sheriff Cornelius Grantham, endangered his completing his "missions." Petitioner even sent letters while in jail to the Veterans Administration, imploring it to release him from its command by removing the implanted communication devices.[1]

On March 1, 1979, as petitioner's hallucinations persisted, petitioner approached Sheriff Grantham in front of the county jail. After exchanging greetings and in plain view of the sheriff's deputies, petitioner shot and killed the sheriff. Petitioner then exchanged fire with a deputy, got into his car, and drove home. Upon arriving there, petitioner sat unarmed on his front porch until his arresting officers arrived.

At the time of the killing, Alabama law provided that an individual was subject to the death penalty if two prerequisites were met. First, the individual had to commit one of the fourteen types of aggravated murder listed in Ala. Code § 13-11-2(a) (1975). Second, the trial judge had to determine that "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6 . . . exist[ed] in the

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[1] Internal parole and probation reports, which did not surface until after petitioner's resentencing, confirmed that, while incarcerated, petitioner "did not know his date of birth, what day of the week it was, the day of the month, or month of the year. [He] did not have any concept of what parole amounted to and his only interest was getting out of jail and to go to the Walter Reed Hospital for treatment" Habeas Pet. App. 109; *see also Magwood v. Jones*, 472 F. Supp. 2d 1333, 1335-37 (M.D. Ala. 2007).

case" and outweighed any mitigating circumstances. *Id.* 13-11-4; *see also* Pet. App. 51a-55a.[2] Murdering a sheriff while on duty or because of some official or job-related act constituted aggravated murder under § 13-11-2(a)(5), but petitioner did not kill Sheriff Grantham under any of the aggravating circumstances enumerated in § 13-11-6.

The State nonetheless charged petitioner with capital murder. It appointed two lawyers to represent him, a childhood friend of Sheriff Grantham and someone who had known the sheriff professionally for twenty-five years. The State also placed petitioner in Searcy State Hospital, where three state psychiatrists unanimously confirmed his paranoid schizophrenia. The psychiatrists also opined that petitioner "was insane at the time of his admission to their hospital, at the time [the doctors] issued their report, and probably at the time of the commission of the offense." Pet. App. 26a. Petitioner, one psychiatrist emphasized, was "not a borderline case"; he was "completely out of touch with reality." *Magwood v. State,* 426 So. 2d 918, 921 & 923 (Ala. Crim. App. 1982).

After receiving this report, the Alabama trial court ordered that petitioner be "restored to his right mind," Tr. Rec. 387, by means of antipsychotic drugs potent enough to "put anyone . . . totally asleep." *Magwood v. Smith,* 608 F. Supp. 218, 226 (M.D. Ala.

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[2] Alabama law as it existed in 1979 is reproduced in the appendix to the district court's opinion, which appears at Pet. App. 91a-99a.

1985). Months later, the court deemed petitioner legally competent to stand trial. *Id* at 227.

Petitioner's trial lasted a day and one-half. "[T]he State's only evidence that [petitioner] was sane came from two general practitioners who examined [petitioner] for 15 and 30 minutes, respectively, and a clinical psychologist who conceded that [petitioner] suffered from paranoid schizophrenia and that he examined [petitioner] two years after the offense conduct and while he was strongly medicated." Pet. App. 26a. The trial court refused to compel the testimony of any of the three doctors from Searcy State Hospital or to grant petitioner funds to hire a psychiatrist as an expert witness of his own. The jury, whose members included numerous acquaintances of the sheriff, *see Magwood v. State*, 426 So.2d 918, 924 (Ala. Crim. App. 1982), rejected petitioner's insanity defense and found him guilty.

Even though none of the "aggravating circumstance[s] in Section 13-11-6" accompanied petitioner's crime, the trial court sentenced petitioner to death. *Magwood*, 426 So.2d at 928 (quoting trial court sentencing order of June 30, 1981). The trial court justified this action by referencing *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), in which the Alabama Supreme Court had held three months earlier (but almost two years after petitioner's crime) that Alabama law no longer required a court to find an

aggravating circumstance under Ala. Code § 13-11-6 in order to impose the death penalty.[3]

2. After the Alabama courts upheld petitioner's conviction and sentence, petitioner filed a federal habeas petition. The U.S. District Court for the Middle District of Alabama left his conviction in place but granted habeas relief as to petitioner's death sentence. The district court held that the sentencing court had inexplicably failed to find or consider any mitigating circumstances relating to petitioner's mental illness. *Magwood v. Smith,* 608 F. Supp. 218, 228 (M.D. Ala. 1985). The Eleventh Circuit affirmed this decision and mandated "a new sentencing hearing in order to satisfy the constitutional standards for sentencing in death penalty cases." *Magwood v. Smith,* 791 F.2d 1438, 1450 (11th Cir. 1986). The State declined to seek review in this Court.

3. In 1986, "the state trial court conducted a 'complete and new' sentencing hearing, including 'a new assessment of all of the evidence, arguments of counsel, and law' and a 'new . . . opportunity for the parties to submit evidence." Pet. App. 27a (quoting portion of state court order reproduced at Pet. App. 103a). Again applying *Kyzer*, the trial court sentenced petitioner to death notwithstanding the

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[3] The Alabama Legislature abrogated *Kyzer* the day after petitioner was sentenced, reinstating the rule for crimes committed after July 1, 1981 that "[u]nless at least one aggravating circumstance as defined in section 13A-5-49 [formerly section 13-11-6] exists, the sentence shall be life imprisonment without parole." Ala. Code § 13A-5-45(f) (1981).

absence of any aggravating circumstance listed in former Ala. Code § 13-11-6. Pet. App. 102a-107a. The Alabama courts upheld this new sentence on direct appeal. *Magwood v. State*, 548 So.2d 512 (Ala. Crim. App. 1988); *Ex parte Magwood*, 548 So.2d 516 (Ala. 1988).

4. Petitioner sought post-conviction relief from his new death sentence in the Alabama courts. Among other things, he argued that "the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered [his] sentence unconstitutional under the . . . 14th Amendment[]." Pet. App. 69a (quoting petitioner's brief). The Alabama Court of Criminal Appeals rejected this "fair warning" argument without noting any preservation problems. *Magwood v. State*, 689 So.2d 959, 965-66 (Ala. Crim. App. 1996). It also rejected petitioner's related argument that his counsel rendered ineffective assistance at resentencing by failing to raise this claim. *Id.* at 967.

5. Petitioner next filed the federal habeas petition at issue here in the U.S. District Court for the Middle District of Alabama, limited to challenging his new sentence. Petitioner renewed, among other arguments, his fair warning and ineffective assistance claims. The district court granted relief on both claims.

As to the fair warning claim, the district court held that applying the formulation of Alabama law announced in *Kyzer* to petitioner's sentencing violated clearly established Due Process Clause limitations on the retroactive application of new law. "[I]t seems beyond dispute," the court explained,

"that the judicial construction of [Alabama death penalty statutes] announced in *Kyzer* was 'unexpected and indefensible by reference to the law which had been expressed prior to' [petitioner's] offense conduct." Pet. App. 55a (quoting *Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964)). The district court also explained – even though the State had not argued to the contrary – that this due process claim was not subject to AEDPA's restrictions on "second or successive" habeas petitions. Pet. App. 63a-65a. Although "the state court committed the same [due process] error" at petitioner's first sentencing, "habeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge[d] the . . . original sentence." Pet. App. 65a.[4]

As to the ineffective assistance claim, the district court held that petitioner's attorney rendered ineffective assistance by failing to argue at resentencing that the Due Process Clause prohibited retroactively applying *Kyzer* to his case. Pet. App. 82a-89a. The district court explained that there could not have been any reasonable strategic reason to forego the claim because it was a clear winner. And counsel's deficient performance unquestionably prejudiced the defense: had counsel successfully made this argument, petitioner would have been ineligible for the death penalty.

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[4] The district court also made clear that this claim was not subject to procedural default. Petitioner raised it in state post-conviction proceedings, and "the Alabama Court of Criminal Appeals denied it on the merits." *See* Pet. App. 68a-70a.

6. The Eleventh Circuit reversed the district court's grant of habeas relief.[5] The Eleventh Circuit did not question the district court's holding on the merits of petitioner's fair warning claim. But it nonetheless ruled that the claim was successive – notwithstanding the fact that it challenged a newly imposed death sentence – because it "was available at [petitioner's] original sentencing." Pet. App. 15a.

The Eleventh Circuit rejected the district court's ineffective assistance holding on the ground that "Alabama's highest court had said in *Kyzer*" that state law did not require finding an aggravating circumstance under Ala. Code § 13-11-6 to impose the death penalty. Pet. App. 19a. Even though *Kyzer* itself had not addressed whether the Due Process Clause permitted that change in Alabama law to be applied retroactively, the Eleventh Circuit reasoned: "We are not prepared to require counsel to raise an argument that has already been decided adversely to his client's position by a state's highest court in order to avoid being found ineffective." Pet. App. 19a-20a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision rests upon two holdings that are patently erroneous. First, the Eleventh Circuit's holding that a claim challenging a new sentence imposed after a previous grant of habeas relief is "successive" if the prisoner's prior

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[5] It also affirmed the district court's rejection of petitioner's other claims for relief. Petitioner does not advance those claims before this Court.

sentence could have been challenged on the same grounds contravenes this Court's and other circuits' consistent recognition that habeas petitions brought against new sentences (or convictions) are first petitions. Second, the Eleventh Circuit's holding that petitioner's counsel rendered effective assistance even though he failed to make a readily available argument that would have established that petitioner was ineligible for the death penalty disregards basic Sixth Amendment principles.

I. The Eleventh Circuit's Construction of What Constitutes a "Second or Successive" Habeas Petition Holding Warrants Review.

A. The Holding is Erroneous.

It has long been hornbook law that the "successive petition doctrine does not apply when . . . a habeas corpus petitioner, who succeeded in overturning a conviction (or sentence) and who is subsequently retried and reconvicted (or resentenced), files a second petition to challenge the new conviction (or sentence)." 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §28.3b, at 1412-13 (5th ed. 2005). The text of AEDPA's successive petition provisions, the purpose of those provisions, and this Court's precedent all confirm that the Eleventh Circuit erred in departing from this elementary principle.

1. 28 U.S.C. § 2244 sets forth special rules limiting the filing of "second or successive" habeas corpus applications. Although neither this statutory section nor any other in AEDPA defines the phrase "second or successive," one thing should be plain: an application cannot be "second or successive" when it

is the *first* one to challenge a new judgment. That being so, no claim in such an application – regardless of whether the applicant could have brought a similar claim against an earlier judgment – can be subject to AEDPA's successive petition rules.

This straightforward understanding of Section 2244 comports with its purpose. Section 2244 "constitute[s] a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Section 2244 "modifie[s]" traditional res judicata doctrine insofar as it *relaxes* that doctrine, owing to the historical tradition of allowing some relitigation in habeas cases that would not be permissible in other types of cases. *See, e.g., Sanders v. United States,* 373 U.S. 1, 8-15 (1963). Accordingly, any litigation that is exempted from traditional res judicata doctrine is necessarily exempted from the reach of Section 2244.

Such is the case here: res judicata exempts litigation that does not involve "the same cause of action" as previous litigation. *G. & C. Merriam Co. v. Saalfield,* 241 U.S. 22, 29 (1916); *see generally* 18 Moore's Federal Practice § 131.01 (2009). And a new claim brought against a new judgment, *see* Pet. App. 103a, 106a, is not the "same" as any claim that was or might have been brought against a previous judgment.

2. This Court's decisions are in accord. This Court deems applications successive only when they "contest[] the same custody imposed by the *same judgment* of a state court." *Burton v. Stewart,* 549 U.S. 147, 153 (2007) (per curiam) (emphasis added); *see also Panetti v. Quarterman*, 551 U.S. 930, 944

(2007) (application is successive when it challenges "*a state-court judgment already challenged* in a prior § 2254 application") (emphasis added); *id.* at 964 (Thomas J., dissenting) (application is successive when it challenges "*a state-court judgment that had been previously challenged* in a federal habeas application") (emphasis added). This Court has never suggested that an application filed against a *new judgment* can be deemed successive.

To the contrary: *Burton* strongly suggests that this Court would not do so. In *Burton*, a state prisoner filed a habeas application in 1998 that challenged his conviction but did not raise any claims against his sentence. After that petition was denied, the prisoner filed another application in 2002, this time challenging the constitutionality of his sentence. The prisoner argued that the 2002 application was not successive because the 1998 application actually challenged a different judgment – the judgment his state court had entered in 1994, before the prisoner had been resentenced. If the Eleventh Circuit's holding that an application challenging a new judgment on grounds that were previously available were correct, Burton's argument would have been irrelevant: his 2002 application would have been successive regardless of whether it challenged a new judgment. But this Court assumed that it *did* matter which judgment the 1998 petition challenged; it rejected the prisoner's argument only on the ground that his 1998 application actually had challenged the "same" judgment as his 2002 application did. *Burton*, 549 U.S. at 156.

This Court's decision in *Richmond v. Lewis*, 506 U.S. 40 (1992), reinforces the conclusion that an

initial habeas petition challenging a new judgment is by definition a first petition. There, a state prisoner who had previously obtained habeas relief challenged the new death sentence that had been imposed at resentencing. As the federal court of appeals' decisions in the case made clear, the prisoner's primary claim – that one of the aggravating factors supporting his sentence was unconstitutionally vague – was one that he could have, but had not, brought against his original sentence. *See Richmond v. Lewis,* 948 F.2d 1473, 1480 (9th Cir. 1992); *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985); C.A. App. C (Petitioner's Specification of Claims Raised in this Petition and in *Richmond v. Cardwell*) at 11. This Court reviewed the prisoner's vagueness claim on the merits and held that he was entitled to habeas relief. Neither the majority nor the concurring or dissenting opinions suggested that the prisoner's claim should be treated as anything other than a first petition, even though contemporaneous law gave this Court the authority to inquire *sua sponte* whether the petition was successive. *E.g., Femia v. United States,* 47 F.3d 519, 524 (2d Cir. 1995); *Jones v. Estelle,* 692 F.2d 380, 384 n.5 (5th Cir. 1982).

B. The Holding Creates A Circuit Split.

Two federal circuits have explicitly rejected the rule that the Eleventh Circuit adopted here. In *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985), the case just described, the Ninth Circuit held that even though a state prisoner could have challenged his original sentence on the same basis as his claim

concerning his resentencing, the claim was not successive "because the second petition was filed in response to the resentencing." *Id.* at 961.[6] The Ninth Circuit later reaffirmed this holding, confirming that a prisoner who has been resentenced to death following a new sentencing hearing "may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence." *Richmond v. Lewis,* 948 F.2d 1473, 1480 (9th Cir. 1992), *rev'd on other grounds,* 506 U.S. 40 (1992).

The Second Circuit issued a similar decision in *Esposito v. United States,* 135 F.3d 111 (2d Cir. 1997). In *Esposito*, a federal prisoner pleaded guilty to various drug offenses and was sentenced to 250 months in prison. He then obtained habeas relief from his sentence on ineffective assistance grounds. Following resentencing, he brought another federal habeas petition, arguing in part that the sentencing court violated his due process rights by failing to pinpoint the particular form of methamphetamine for which he had been responsible.[7] (Different forms of

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[6] Although the Ninth Circuit's decision predates AEDPA, nothing in AEDPA altered what constitutes a successive petition. *See Panetti,* 551 U.S. at 944 (citing *Slack v. McDaniel,* 529 U.S. 473 (2000)); *id.* at 964 (Thomas, J., dissenting) ("Before AEDPA's enactment, the phrase 'second or successive' meant the same thing it does today."). AEDPA merely codified the concept and further restricted the circumstances under which claims in successive petitions can go forward. *See* 28 U.S.C. § 2244.

[7] Although the applicant in *Esposito* was a federal prisoner and thus sought habeas relief under 28 U.S.C. § 2255 instead of

the drug carried different guidelines ranges.) Even though it must have been possible for the prisoner to have challenged his first sentence on this basis, the Second Circuit held that the claim was not successive because it "s[ought] – for the first time – collateral review of the new sentence." *Id.* at 113; *see also Vasquez v. Parrott,* 318 F.3d 387, 390 (2d Cir. 2003) ("[E]ven a petition that has been finally adjudicated on the merits will not count for purposes of the successive petition rule unless the second petition attacks the *same judgment* that was attacked in the prior petition.") (internal quotation and citation omitted) (emphasis added).

The Eleventh Circuit claimed (Pet. App. 14a) that its holding was consistent with a different Second Circuit decision, *United States v. Galtieri,* 128 F.3d 33 (2d Cir. 1997). But *Galtieri* addressed a materially different situation than petitioner's: there, a prisoner's original sentence had merely been amended – that is, he had been only *partially* resentenced – following habeas relief. The Second Circuit held that a claim in his new habeas filing was successive "to the extent that it challenge[d] the underlying conviction or s[ought] to vacate any component of the original sentence *that was not amended.*" *Id.* at 38 (emphasis added). Nothing in

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§ 2254, "the same mode of analysis applies when addressing the restriction on second or successive motions contained in § 2255." *United States v. Pedrazza,* 466 F.3d 932, 933 n.1 (10th Cir. 2006); *see also* 28 U.S.C. § 2255(h) (expressly incorporating rules set forth in Section 2244); *Munoz v. United States,* 331 F.3d 151, 152 (1st Cir. 2003).

this holding indicates that a claim challenging an entirely new sentence could ever be deemed second or successive. To the contrary, *Galtieri* made clear in dicta – foreshadowing the Second Circuit's later holding in *Esposito* – that a habeas petition "will be regarded as a 'first' petition . . . to the extent that it seeks to vacate the new, amended component of [a] sentence." *Galtieri,* 128 F.3d at 37-38. That is the situation here: petitioner's death sentence is entirely new; no part of the prior one remains. Pet. App. 27a.

C. The Holding Has Pernicious Consequences For The General Administration Of Habeas Corpus.

It is important to review the Eleventh Circuit's decision not only because petitioner faces an execution that could not be carried out if he were under the jurisdiction of another circuit, but also because the decision threatens to upend settled understandings in current habeas corpus law.

A moment's reflection on the way AEDPA works reveals why this is so, and why the Eleventh Circuit's decision illegitimately insulates new judgments, following initial grants of habeas relief, from collateral attack. As this Court emphasized in *Artuz v. Bennett,* 531 U.S. 4, 9-10 (2000), courts construing AEDPA must be attentive to the difference between the words "application" and "claim." Section 2244 requires courts to decide as a threshold matter whether a habeas "application" – that is, a whole filing – is successive. If it is, then the Section provides rules for determining whether each individual "claim" in the application may go forward. If a claim in a successive petition has already been

litigated, it must be dismissed; if it is new, it can proceed only under limited circumstances.

The Eleventh Circuit's ruling turns this methodology on its head. Before even asking whether an *application* against a new judgment is successive, the Eleventh Circuit apparently now intends to inspect each individual *claim* in all such applications. If applicants could have challenged their original judgments on the same ground as any claim they advance against the new judgment, the Eleventh Circuit treats the claim as though raised in a successive application.

The only way for the Eleventh Circuit to render that holding consistent with the order of analysis that Section 2244 directs would be to treat all applications (that is, *all claims in all applications*) brought against reconvictions or resentencings following successful habeas attacks as successive. But this approach would raise several problems. Among them:

- It would require all claims against new judgments, even those that arise for the first time at retrials or reconvictions following successful habeas petitions, to be dismissed unless, in the words of Section 2244(b)(2), they (A) "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (B) establish by clear and convincing evidence that the petitioner is innocent. This outcome, however, would contravene the universally settled understanding – accepted even by the Eleventh Circuit in this case, *see* Pet. App. 15a – that claims that arise for the first time at retrial or resentencing are not subject to rules governing

second or successive petitions. *See, e.g., In re Taylor,* 171 F.3d 185 (4th Cir. 1999), *cited with approval in Burton,* 549 U.S. at 156. In other words, making sense of the Eleventh Circuit's holding here would render retrials and resentencings virtually immune from collateral attack.[8]

• Indeed, treating applications challenging reconvictions or resentencings entered following successful habeas attacks as successive would render new judgments committing *the same violations that triggered habeas relief in the first place* immune from challenge. The same would be true with respect to constitutional violations that prisoners challenged but that first habeas courts did not reach the first time around because they granted relief on different grounds. In both of these scenarios defendants would have raised the constitutional objections at issue in earlier habeas applications, so Section 2244, under the Eleventh Circuit's reading, would require federal courts to dismiss the claims. 28 U.S.C. § 2244(b)(1). This result is not only starkly counterintuitive but may well violate the constitutional prohibition against suspending the writ. *See* U.S. Const. art I, § 9, cl. 2 (Suspension Clause).

• Treating all applications challenging reconvictions or resentencings following successful habeas

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[8] The ineffective assistance claim that arises in this case would be the rare exception to this rule, for if petitioner's attorney had performed at a constitutionally acceptable level, the attorney would have made clear that petitioner "is 'actually innocent' of the death penalty." Pet. App. 57a; *see infra* at 20-22 (laying out ineffective assistance claim).

attacks as successive would also prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court. Consider, for example, a hypothetical defendant whose conviction became final in 2003, who later received habeas relief, and who was reconvicted in 2005. Such a prisoner would be precluded from seeking habeas relief based on a flagrant violation at the 2005 trial of the Confrontation Clause as explicated in *Crawford v. Washington,* 541 U.S. 36 (2004). That decision is not – as Section 2244(b)(2) requires – retroactive, *see Whorton v. Bockting,* 549 U.S. 406 (2007), or relevant to establishing actual innocence.

II. The Eleventh Circuit's Ineffective Assistance Holding Warrants Review.

The district court held that petitioner's attorney rendered ineffective assistance by failing to argue at petitioner's resentencing that the Due Process Clause prohibited retroactively applying the new Alabama law announced in *Ex parte Kyzer,* 399 So.2d 330 (Ala. 1981), to his case. Pet. App. 82a-89a. That new law dispensed with the prior requirement that at least one aggravating factor listed in Ala. Code. § 13-11-6 (1975) exist before sentencing someone to death; the new law provided, in other words, that petitioner's crime alone, without any of the aggravating circumstances required at the time of his crime under Section 13-11-6, rendered him death eligible. Had petitioner's attorney made this due process argument, this Court's precedent would have required the trial court to hold that petitioner could not be sentenced to death. Pet. App. 57a.

The Eleventh Circuit did not quibble with the well accepted premise that attorneys render ineffective assistance when they fail, without any reasonable strategic basis, to raise a readily available and winning argument. *See Kimmelman v. Morrison,* 477 U.S. 365, 374, 382 (1986). The Eleventh Circuit nonetheless reversed the district court, basing its holding on the following two sentences:

> While there was a possible objection [petitioner's attorney could have made], Alabama's highest court had said in *Kyzer* that a § 13-11-2 aggravating factor could be used as an aggravating circumstance. We are not prepared to require counsel to raise an argument that already has been decided adversely to his client's position by a state's highest court in order to avoid being found ineffective.

Pet. App. 19a-20a.

To the extent the Eleventh Circuit assumed in this passage that *Kyzer* rejected a *federal due process* challenge to applying the new law announced in *Kyzer* retroactively, the Eleventh Circuit is simply wrong. *Kyzer* never considered any such argument. Rather, the Alabama Supreme Court simply held that state law gave it the authority to rewrite Alabama law to declare that defendants could be sentenced to death even when no aggravating fact listed at Ala. Code § 13-11-6 was present. *Kyzer,* 399 So.2d at 339. This decision *gave rise* to the federal due process argument petitioner's attorney failed to raise at his resentencing; it did not address it, much less decide it adversely.

To the extent the Eleventh Circuit meant that it was not unreasonable for petitioner's attorney to have failed to raise the federal due process argument at resentencing because the Alabama Supreme Court in *Kyzer* asserted state-law authority to change Alabama law, the Eleventh Circuit was equally mistaken. A state court's prior rejection of state-law arguments says nothing about the merits of a theoretically different federal constitutional claim.

In short, the Eleventh Circuit had no sound reason for overturning the district court's ineffective assistance holding. Certiorari should be granted on this issue as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

Billie Joe MAGWOOD, Petitioner-Appellee,
Cross-Appellant,
v.
Grantt CULLIVER, Warden, Richard F. Allen,
Commissioner, Alabama Departments of Corrections,
Troy King, Attorney General of Alabama,
Respondents-Appellants, Cross-Appellees.

No. 07-12208

Jan. 23, 2009

Before TJOFLAT, DUBINA and BLACK, Circuit Judges.

BLACK, Circuit Judge:

Grantt Culliver, Richard F. Allen and Troy King (the State) appeal the district court's partial grant of Alabama death-row inmate Billy Joe Magwood's 28 U.S.C. § 2254 habeas corpus petition on Magwood's fair-warning claim[1] and ineffective assistance of counsel based on the fair-warning claim. Magwood cross-appeals the partial denial of his petition, raising

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[1] Magwood asserts his death sentence violated the fair-warning requirement of the due process clause because it was based on *Ex parte Kyzer*, 399 So.2d 330 (Ala.1981), which was decided after he committed his offense and retroactively applied to his case.

the multiple issues as discussed in section III.B of this opinion. After review, we affirm in part and reverse in part and render judgment in favor of the State.

I. BACKGROUND

A. Factual background

The facts of Magwood's offense are not in dispute. They are set forth in an opinion by the Alabama Court of Criminal Appeals, as follows:

> Thomas Weeks, a Coffee County Deputy Sheriff, testified he was employed as the county jailer on March 1, 1979, under Coffee County Sheriff Neil Grantham. The witness stated he observed [Magwood], whom he recognized as a former jail inmate, sitting in a car parked in Sheriff Grantham's parking space at approximately 6:45 a.m. Shortly before 7:00 a.m., he observed Sheriff Grantham drive up and park his vehicle. He got out of the automobile, walked to some garbage cans and deposited a trash bag, and then walked towards the jail door. [Magwood] got out of his automobile with something in his hand and met Sheriff Grantham at the rear of the car. At that point, Deputy Weeks heard three gunshots and saw Sheriff Grantham fall. The witness then turned back into the jail and obtained a gun. He observed [Magwood] get back into his car and saw that he held a pistol in his hand. He exchanged fire with [Magwood] as he drove away. Deputy Weeks then went over to where Sheriff

> Grantham lay on the ground and observed that the Sheriff's face was blue and that he appeared not to be breathing, having apparently been hit in the face and neck. Deputy Weeks stated he observed no one else in the area at the time the Sheriff was killed.

Magwood v. State, 426 So.2d 918, 920 (Ala. Crim. App. 1982).

B. Procedural background

Magwood murdered Sheriff Grantham on March 1, 1979. Magwood was convicted and sentenced to death for the murder on June 2, 1981. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's conviction and death sentence. *Magwood v. State,* 426 So.2d 918 (Ala. Crim. App.1 982), *aff'd,* 426 So.2d 929 (Ala. 1983). The United States Supreme Court denied Magwood's petition for writ of certiorari. *Magwood v. Alabama*, 462 U.S. 1124 (1983).

On July 13, 1983, Magwood filed a petition for writ of error coram nobis in the Circuit Court of Coffee County. This petition was denied and on March 20, 1984, the Alabama Court of Criminal Appeals affirmed the denial of the coram nobis petition. *Magwood v. State*, 449 So.2d 1267 (Ala. Crim. App. 1984). A motion for out-of time appeal was denied by the Alabama Supreme Court on June 5, 1984. *Ex parte Magwood,* 453 So.2d 1349 (Ala. 1984).

Magwood then filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the United States District

Court for the Middle District of Alabama. On March 26, 1985, the district court upheld Magwood's conviction but conditionally granted the writ as to the sentence, based on the failure of the sentencing court to find two mitigating circumstances. *Magwood v. Smith,* 608 F. Supp. 218 (M.D. Ala. 1985). This Court affirmed the district court's decision. *Magwood v. Smith,* 791 F.2d 1438 (11th Cir. 1986).

A resentencing hearing was conducted on September 17, 1986. On October 2, 1986, the Alabama trial court, after considering the additional mitigating circumstances as ordered by the federal district court, again sentenced Magwood to death. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's resentencing. *Magwood v. State,* 548 So.2d 512 (Ala. Crim. App.), *aff'd,* 548 So.2d 516 (Ala. 1988). The United States Supreme Court denied Magwood's petition for writ of certiorari. *Magwood v. Alabama*, 493 U.S. 923 (1989).

Magwood filed an application in this Court for permission to file a second habeas corpus petition in the district court challenging his conviction, which we denied. *In re Magwood*, 113 F.3d 1544, 1553 (11th Cir. 1997). Magwood filed a second habeas petition challenging his resentencing on April 23, 1997. The district court granted Magwood's habeas petition on his fair-warning claim and ineffective assistance of counsel based on the fair-warning claim and vacated Magwood's death sentence. The district court denied relief on all other claims. *Magwood v. Culliver*, 481 F. Supp. 2d 1262 (M.D. Ala. 2007).

The State appeals as of right the two issues on which the district court granted relief. The district court granted a certificate of appealability as to all of the issues Magwood cross-appeals.

II. STANDARD OF REVIEW

Magwood filed this habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and AEDPA applies to this appeal. Under AEDPA, "[a] federal court may not grant a petition for a writ of habeas corpus to a state prisoner on any claim that has been adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court." *Clark v. Crosby,* 335 F.3d 1303, 1308 (11th Cir. 2003). A federal court's review is further restricted by 28 U.S.C. § 2254(e), which provides "a determination of a factual issue made by a State court shall be presumed to be correct" and places the burden on the petitioner to rebut the presumption of correctness "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. ANALYSIS

A. State's appeal

1. Fair warning

The State asserts the district court erred when it granted relief on Magwood's claim that the retroactive

application of the judicial rule in *Ex parte Kyzer,* 399 So.2d 330 (Ala. 1981), deprived Magwood of due process of law because the claim is precluded under 28 U.S.C. § 2244(b) as successive.[2]

a. Alabama's death penalty statute and Ex parte Kyzer

A review of Alabama's death penalty laws at the time of Magwood's offense and *Ex parte Kyzer* will be helpful in the analysis of Magwood's fair-warning claim.

i. The 1975 Act

Magwood committed the crime on March 1, 1979. At that time, Alabama's death penalty statute provided in Alabama Code § 13-11-2(a)(5) (1975):

> (a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:
>
> (5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any

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[2] The State also contends the district court erred in granting relief on Magwood's fair-warning claim because the claim is procedurally defaulted and is meritless. We do not address these contentions as we conclude Magwood's claim is successive.

> kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard.

Alabama Code § 13-11-4 (1975), entitled "Determination of sentence by court; court not bound by punishment fixed by jury" provided:

> Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:
>
> (1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death . . . .

Alabama Code § 13-11-6 (1975), did not have a corresponding aggravating circumstance to the crime for which Magwood was convicted, namely the murder of a law enforcement officer. Additionally, the

resentencing court specifically found that Magwood's crime did not qualify him for any of the listed aggravating circumstances enumerated in Alabama Code § 13-11-6 (1975).

Thus, although Magwood's conviction under Alabama Code § 13-11-2(a)(5) (1975), forced the jury to fix the punishment at death, the judge could nonetheless sentence Magwood to life imprisonment without parole. Magwood asserts that under Alabama Code § 13-11-4 (1975), he should have been sentenced to life imprisonment, as § 13-11-4 (1975) requires there be an aggravating circumstance listed in § 13-11-6 (1975). Magwood did not have an aggravating circumstance listed in § 13-11-6 (1975), to correspond with his crime.

ii. Beck v. Alabama

In *Beck v. Alabama,* 447 U.S. 625 (1980), the United States Supreme Court found fault with the Alabama death penalty scheme because it failed to allow a jury in a capital case to consider lesser included, noncapital offenses. On remand, the Alabama Supreme Court determined the preclusion clause could be removed from the statute, allowing the Alabama rule on lesser included offenses in noncapital cases to apply to capital cases. *Beck v. State*, 396 So.2d 645, 658-59 (Ala. 1980). The Alabama Supreme Court further decided the statute required jury participation in the sentencing process, and created the necessary procedures by adding an additional stage to the trial of a capital case. *Id.* at 659-62.[3]

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[3] The jury first considers a defendant's guilt, not only with

iii. Ex parte Kyzer

Kyzer was tried and convicted under Alabama's 1975 death penalty statute, § 13-11-2(a)(10), for first degree murder "wherein two or more human beings are intentionally killed by the defendant by one or a series of acts." *Ex parte Kyzer,* 399 So.2d 330, 332 (Ala. 1981). The Alabama Supreme Court concluded there was an evidentiary basis for lesser included offense instructions in Kyzer's case, and thus reversed and remanded for a new trial to be conducted in conformance with *Beck*. *Id.* at 333.

However, based on the facts of Kyzer's case, the Alabama Supreme Court went on to address the issue of whether the death penalty would be an available option to the State if Kyzer was retried. Kyzer, like Magwood, was convicted of an aggravated offense in § 13-11-2 (1975), for which the legislature failed to provide a corresponding aggravating circumstance in § 13-11-6 (1975). The Alabama Supreme Court stated: "[t]his case presents in purest form an anomaly in Alabama's Death Penalty Statute." *Id.* at 334. The Alabama Supreme Court concluded "[a] literal and

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respect to the capital charge but also concerning those noncapital, lesser included offenses supported by the evidence. If the jury convicts the accused of a capital offense, the trial proceeds to a second stage consisting of a sentence hearing during which the jury hears any evidence of aggravating and mitigating circumstances. If the jury is unable to unanimously agree on a death sentence, the judge sentences the accused to life imprisonment without parole. If the jury imposes a death sentence, the judge conducts a sentencing hearing without the jury and imposes a sentence of either death or life imprisonment without parole. *See Beck*, 396 So.2d at 662-63.

technical reading of the statute" would lead to the conclusion that if the trial judge cannot find the existence of an aggravating circumstance other than the one averred in the indictment, the trial judge must refuse to accept the death penalty as fixed by the jury. *Id.* at 337. The Alabama Supreme Court could think of no reason the Alabama legislature would have imposed such a result, however, and concluded the trial judge is authorized to find the same aggravation averred in the indictment and proven beyond a reasonable doubt to the jury. *Id.* at 337-38.

b. Successive petition

The State argues Magwood's fair-warning claim is a successive petition within the meaning of 28 U.S.C. § 2244(b)(2). Magwood filed his first 28 U.S.C. § 2254 petition on July 20, 1983, and the district court ruled on that petition on March 26, 1985. Magwood did not argue his fair-warning claim in his first habeas petition, although the aggravator averred in the indictment was his sole aggravator. Magwood filed an application in this Court for permission to file a second habeas corpus petition in the district court challenging his conviction, which we denied. *In re Magwood*, 113 F.3d 1544, 1553 (11th Cir. 1997). In his application for permission to file a second petition, he did not mention his fair-warning claim. The current petition on appeal is the first federal habeas petition in which Magwood asserts his fair-warning claim.

According to 28 U.S.C. § 2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254

> that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Magwood does not argue that his case fits into one of these exceptions. Instead, he asserts the fair-warning claim is not successive because he challenges only the state trial court's application of *Kyzer* at his resentencing, not at his original sentencing. Because he limits his fair-warning claim to the resentencing, he contends he necessarily could not have challenged it in his first habeas petition.

The district court concluded that, based on *Ex parte Green,* 215 F.3d 1195 (11th Cir. 2000), Magwood's fair-warning claim is not successive within the meaning of AEDPA. In *Green,* the petitioner filed an application seeking an order authorizing the

district court to consider a second or successive petition under 28 U.S.C. § 2255. *Id.* at 1195. Green pled guilty to possession with intent to distribute cocaine base and was sentenced. After the district court was affirmed on direct appeal, Green filed his first 28 U.S.C. § 2255 petition. *Id.* The district court granted the petition with respect to Green's *Bailey v. United States,* 516 U.S. 137 (1995), claim, and denied relief as to all other claims. *Green,* 215 F.3d at 1195-96. Green appealed, but this Court did not issue a certificate of appealability. The district court then held a resentencing and entered an amended judgment. Green thereafter filed a second § 2255 motion, alleging his counsel rendered ineffective assistance at resentencing. The district court found the motion constituted a second or successive motion because Green's claims concerned the same conviction attacked in his first § 2255 motion. *Id.* at 1196.

Green applied for permission to file a successive § 2255 petition in this Court, which we denied as unnecessary, reasoning Green's § 2255 motion attacked only his amended sentence. "Because Green attacks the constitutionality of his re-sentencing proceeding only, and not the validity of his conviction, we hold this § 2255 motion is not 'second or successive.' Green obviously could not challenge his counsel's effectiveness at re-sentencing at the time he filed his first § 2255 motion." *Id.* at 1196. We concluded his application to file a successive motion was unnecessary because the motion attacked for the first time a sentence that was not yet imposed at the time of his first § 2255 motion. *Id.*

Green's ineffective assistance of resentencing counsel is distinguishable from Magwood's fair-warning claim in one important respect. Unlike Green's claim, Magwood's fair-warning claim was available when he filed his first § 2254 petition. Greens ineffective assistance of counsel at resentencing claim necessarily was not available until after Green's resentencing. Magwood's fair-warning claim was available when he filed his first petition, as his only aggravating factor at his first sentencing was the same one charged in the indictment. We now must consider whether Magwood may bring this fair-warning claim even though it was available when he filed his first petition.

We noted this possibility in *Walker v. Crosby,* 341 F.3d 1240, 1245 n.4 (11th Cir. 2003). In *Walker,* we concluded Walker's § 2254 petition was not second or successive because his first petition was dismissed without prejudice for failure to exhaust state remedies, and thus we had "no occasion to decide whether and to what extent § 2244(b) allows a petitioner, who filed one habeas application and is then resentenced, to bring another habeas application that, in part, challenges his resentencing." *Id.* We further noted "[o]ther courts have suggested that in such a case the district court is allowed to separate the new claims challenging the resentencing from the old claims that were or should have been presented in the prior application." *Id.* (citing *In re Taylor,* 171 F.3d 185, 188 n.* (4th Cir. 1999); *Walker v. Roth,* 133 F.3d 454, 455 n.1 (7th Cir. 1997); *Galtieri v. United States,* 128 F.3d 33, 37-38 (2d Cir. 1997)).

We now have occasion to answer the question noted in *Walker* – "whether and to what extent § 2244(b) allows a petitioner, who filed one habeas application and is then resentenced, to bring another habeas application that, in part, challenges his resentencing." 341 F.3d at 1245 n.4. We find persuasive the Second Circuit's analysis in *Galtieri*, 128 F.3d at 37-38. In that case the Second Circuit noted AEDPA does not define what constitutes a second or successive petition in either § 2255 or § 2254. Any petition for habeas relief that is filed after a prior one cannot automatically be discounted as being successive, however, because a petitioner could be successful in a first petition and succeed in receiving a new sentencing hearing. A second petition after resentencing could challenge errors from the amended sentence. *Id.* at 37. The Second Circuit disapproved, however, of considering the second petition after resentencing as a first petition challenging the amended sentence.

> That approach . . . would permit every defendant who succeeds in having any component of his sentence modified to bring a renewed challenge . . . to the unamended components of his original sentence, raising grounds that were either available for presentation on the first petition or even specifically rejected on that petition. Congress, in enacting sections [2255 and 2254] to sharply restrict repetitive habeas petitions, could not have wanted such an indulgent result.

Id. at 37. The Second Circuit then concluded:

> [W]henever a first 2255 petition succeeds in having a sentence amended, a subsequent 2255 petition will be regarded as a "first" petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a "second" petition to the extent that it challenges . . . any component of the original sentence that was not amended.

Id. at 37-38.

Applying this approach in Magwood's case, those claims seeking to challenge the new, amended component of the sentence are regarded as part of a first petition, and those claims seeking to challenge any component of the original sentence that was not amended are regarded as part of a second petition. Here, the fair-warning claim was available at Magwood's original sentencing. On resentencing, the exact same aggravator—the one alleged in the indictment as allowed by Kyzer—was used again. As Magwood's fair-warning claim was available at his original sentencing, Magwood's claim is successive and is governed by 28 U.S.C. § 2244(b)(2).[4] This claim is

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[4] Magwood asserts under *Burton v. Stewart*, 549 U.S. 147, 156-57 (2007), this claim is not successive because he is challenging the judgment under which he is in custody-the resentencing. The problem with Magwood's argument is that he could have, and did, challenge his sentence which contained the same purported error in his first habeas petition.We applied *Burton* in *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007) (*Ferreira* II). In *Ferreira* II, we reconsidered our earlier decision that Ferreira's petition for habeas corpus was time-barred. *Ferreira v. Sec'y,*

due to be dismissed because it is successive, and Magwood does not assert it fits into one of § 2244(b)(2)'s exceptions. Thus, we reverse the district court's grant of relief on this claim, and dismiss Magwood's fair-warning claim as successive.

2. Ineffective assistance of counsel on the fair-warning claim

The State claims the district court erred when it concluded Magwood's attorney was constitutionally ineffective during his resentencing because he failed to argue that the retroactive application of *Kyzer* to Magwood's case was a violation of due process.

In order for Magwood to obtain relief on his ineffective assistance of counsel claim, he must show

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Dep't of Corr., 183 Fed. Appx. 885 (11th Cir. 2006) (*Ferreira* I). We held in *Ferreira* I that when a petitioner who has been resentenced challenges only his underlying conviction in a habeas petition, the one-year statute of limitations in AEDPA runs from the date the conviction became final, regardless of when the petitioner's corrected sentence became final. After considering *Burton*, *Ferreira* II held "that AEDPA's statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction *and* sentence the petitioner is serving becomes final." *Ferreira* II, 494 F.3d at 1288. Thus, Ferreira's challenge to his conviction, filed after his resentencing, was timely. *Id.* at 1293. Our conclusion in *Ferreira* does not affect this case, however, because (1) *Ferreira* was deciding a statute of limitations issue; and (2) Ferreira was challenging his conviction, which he had not challenged in his first habeas petition.Conversely, Magwood challenged his sentence (which contained the same purported error) in his original habeas petition, thus his fair-warning claim is successive.

(1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Counsel's effectiveness is presumed, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.' " *Chandler v. United States,* 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (quoting *Darden v. Wainwright,* 477 U.S. 168, 186 (1986)). "To overcome [the] presumption in favor of competence, the petitioner bears the heavy—but not insurmountable—burden of persuading the court 'that no competent counsel would have taken the action that his counsel did take.' " *Haliburton v. Sec'y for Dep't of Corr.,* 342 F.3d 1233, 1243 (11th Cir. 2003) (quoting *Chandler,* 218 F.3d at 1314-15).

Magwood asserted the ineffective assistance of counsel at resentencing on the fair-warning claim on collateral review in state court, where both the trial court and Alabama Court of Criminal Appeals rejected it. The district court disagreed with the state courts' conclusions, and found counsel was ineffective for failing to argue to the resentencing court that the retroactive application of *Kyzer* to Magwood's case was a violation of the due process clause. The district court had already concluded the state trial court violated the

fair-warning component of the due process clause by retroactively applying *Kyzer* to Magwood's case. The district court found that at the resentencing hearing, Magwood's counsel stated the court could sentence Magwood to death without finding an aggravating circumstance in § 13-11-6. Defense counsel stated:

> We say to Your Honor, as we did in some proposed findings that we submitted to you, that the capital offense itself is an aggravating circumstance and that this Court has every right to consider it as an aggravating circumstance.

Applying *Strickland,* the district court concluded the combination of defense counsel misstating the law as it was clearly established by United State Supreme Court precedent in *Bouie v. City of Columbia,* 378 U.S. 347 (1964), and failing to argue against the retroactive application of *Kyzer*, was deficient performance by counsel. *Magwood*, 481 F. Supp. 2d at 1292-93.

The district court relied on *Cave v. Singletary,* 971 F.2d 1513 (11th Cir. 1992), in finding Magwood's counsel deficient. In *Cave,* the defendant's attorney emphasized the fact the defendant was guilty of robbery and essentially conceded the State had proven its case as to guilt. Defense counsel did not understand her client could be convicted of felony murder if he participated in a robbery, and so made the nonsensical argument to the jury that, although he committed the robbery, he was not guilty of felony murder. *Id.* at 1517-18. We found counsel's performance deficient. *Id.*

The district court also concluded Magwood's counsel's deficient performance was prejudicial. If counsel had been able to successfully argue a death sentence violated the fair-warning principle of the due process clause, the district court reasoned the outcome of the case would surely have been different. *Magwood*, 481 F. Supp. 2d at 1293.

The district court then addressed whether the state court was unreasonable in rejecting Magwood's ineffectiveness claim. The Alabama Court of Criminal Appeals rested its holding on the fact the lawyer had no substantive role in the resentencing. The district court found this conclusion unreasonable, whether regarded as a legal issue or a factual issue. The Alabama court's holding was not consistent with legal requirements, clearly established by the United States Supreme Court, that individualized consideration of the aggravating and mitigating factors is required. *Zant v. Stephens*, 462 U.S. 862, 879 (1983). The holding was also not consistent, factually, with what actually happened at resentencing. Thus, the district court found the Alabama court's holding, that counsel's performance was adequate because the federal courts only ordered a resentencing court to find the mitigating circumstances, unreasonable and concluded habeas relief was due to be granted on this claim. *Magwood*, 481 F. Supp. 2d at 1293-95.

We conclude the district court erred in holding that counsel's performance was deficient. While there was a possible objection, Alabama's highest court had said in *Kyzer* that a § 13-11-2 aggravating factor could be used as an aggravating circumstance. We are not prepared to require counsel to raise an argument that

has already been decided adversely to his client's position by a state's highest court in order to avoid being found ineffective. The district court relies on *Cave,* and in that case, counsel did not understand the felony murder rule—a much more elementary legal concept. Magwood has failed to overcome the presumption in favor of competence. Because we do not find the performance of Magwood's counsel deficient, we need not discuss the prejudice prong. *See Strickland,* 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."). Thus, we reverse the district court's holding that Magwood's resentencing counsel was ineffective in failing to argue the retroactive application of *Kyzer* was a violation of due process.

B. Magwood's Cross-Appeal

Magwood asserts multiple issues on cross-appeal. Specifically, he asserts the district court erred in denying him discovery and an evidentiary hearing on his claim he was denied effective assistance of counsel. Magwood asserts counsel was ineffective for failing to investigate and present any evidence at his resentencing, including mitigating evidence that was later obtained and proffered to the Alabama courts in the collateral challenge to his sentence, and appended to his habeas corpus petition in the district court. Magwood also contends the district court erred in denying him relief on the remainder of his ineffective assistance of counsel claims, including that his counsel: (1) failed to demand a jury at resentencing; (2) permitted the resentencing court to rely on the jury

recommendation from the first sentencing and the State's wholesale introduction of the record, including inadmissible evidence from the trial and first sentencing; and (3) failed to object to the unconstitutional grounds of his resentencing. Magwood next contends the district court erred in declining to consider the merits of his claims that Alabama had suppressed internal departmental reports and documents that directly belied the Alabama court's expressed bases for reimposing a sentence of death notwithstanding the two statutory mental state mitigating circumstances, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and in denying discovery and an evidentiary hearing thereon. Magwood also asserts the district court erred by not granting him relief from his death sentence on the ground it was freakish and arbitrary, insofar as Magwood is the sole Alabamian to ever have been sentenced to death: (1) in the absence of at least one of the aggravating circumstances required by statute; or (2) having committed a capital offense while suffering from a mental disease that placed him under the influence of extreme mental disturbance and so impaired his capacity to appreciate the criminality of his act and to conform his conduct to the requirements of the law that those enumerated Alabama statutory mitigating circumstances were met, in violation of the Eighth and Fourteenth Amendments. Magwood next argues the district court erred in denying relief on his claims that the resentencing court, in response to the federal court's writ vacating his first death sentence, merely substituted for its refusal to recognize the existence of Alabama's two statutory mental capacity mitigating circumstances, findings of his purported capacity that were the equivalent of their earlier

refusal and, therefore, were incompatible with the prior writ, and that he was denied effective assistance due to his counsel's failure to object to the sentence on that ground. Finally, Magwood asserts Alabama unconstitutionally deprived Magwood of a jury on resentencing and he was involuntarily medicated and presented to the Alabama courts as competent and of apparent capacity.

After hearing oral argument and reviewing the record and the parties' briefs, we find no error in the district court's denial of relief on the above-listed claims. Thus we affirm the district court's denial of relief on these claims.

IV. CONCLUSION

We REVERSE the district court's grant of relief on Magwood's fair-warning claim and ineffective assistance of counsel on Magwood's fair-warning claim. We AFFIRM the district court's denial of relief on the claims Magwood asserts in his cross-appeal. Thus, we render judgment in favor of the State.

REVERSED IN PART; AFFIRMED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA,
Northern Division.

Billy Joe MAGWOOD, Petitioner,
v.
Grantt CULLIVER, Warden, et al., Respondents.

No. 2:97 cv629-MHT

April 9, 2007.

OPINION

MYRON H. THOMPSON, District Judge.

This case is before the court on petitioner Billy Joe Magwood's third habeas petition, in which he challenges his 1986 death sentence on the grounds that it violates the Sixth Amendment, the Eighth Amendment, and the Fourteenth Amendment, as well as this court's 1985 conditional grant of habeas corpus. Specifically, Magwood argues that the Alabama courts failed to conduct a proper proportionality review of his sentence; that the Alabama courts relied on arbitrary and non-statutory aggravating factors in finding that a death sentence was appropriate; that his mental illness rendered him ineligible for the death penalty; that his sentence violates the fair-warning principle of

due process; that the state sentencing court's findings at his 1986 resentencing were inconsistent with this court's 1985 conditional grant of habeas corpus; that a jury should have been empaneled at his 1986 resentencing; that his counsel was unconstitutionally ineffective; and, finally, that he was involuntarily medicated in violation of due process.

For the reasons that follow, the petition will be granted as to Magwood's fair-warning claim and the aspect of the ineffective-assistance claim that flows from it, and the petition will be denied in all other aspects.

I. STANDARD OF REVIEW

The standard of review in this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA provides that, where claims were originally adjudicated in state court, relief on claims included in an application for a writ of habeas corpus can be granted only under two circumstances. First, as to matters of law, relief may be granted only where the state-court adjudication resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law, as that law is set forth by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Second, as to matters of fact, relief may be granted only where the state court's determination of the facts was unreasonable in light of the evidence presented to the state court. 28 U.S.C. § 2254(d)(2).

In *Williams v. Taylor,* 529 U.S. 362 (2000), the United States Supreme Court held that a decision is

"contrary to" clearly established federal law if the state court has arrived at a conclusion opposite one reached by the United States Supreme Court on a question of law, or if the state court has decided a case differently from the way the United States Supreme Court has on materially indistinguishable facts. 529 U.S. at 405. An "unreasonable application" of that law occurs where the state court identifies the correct legal standard from the United States Supreme Court's cases, but unreasonably applies it; an "unreasonable application" also occurs where a state court unreasonably extends, or refuses to extend, a legal principle from those cases. *Id.* at 407.

II. BACKGROUND

A. Conviction and First Habeas Petition

Magwood was convicted on June 2, 1981, for the capital murder of the Sheriff of Coffee County, Alabama, C.F. "Neil" Grantham, which occurred on March 1, 1979. Thereafter, he was sentenced to death by electrocution. Following exhaustion of his remedies in state court, Magwood filed a federal-habeas petition in this court under 28 U.S.C. § 2254 challenging his conviction and sentence. This court denied the petition as to Magwood's conviction, but found that he should be resentenced based on the sentencing court's failure to find the existence of the following two statutory mitigating circumstances: (1) the capital felony was committed while Magwood was under the influence of extreme mental or emotional disturbance, and (2) Magwood's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *Magwood v. Smith,*

608 F. Supp. 218, 225 (M.D. Ala. 1985) (Hobbs, C.J.), *aff'd,* 791 F.2d 1438 (11th Cir. 1986).

According to this court, the state trial court's failure to find the existence of these mitigating circumstances was clearly erroneous in light of the overwhelming evidence regarding Magwood's mental condition at the time of the offense. *Id.* at 226. This court noted that the State's only evidence that Magwood was sane came from two general practitioners who examined Magwood for 15 and 30 minutes, respectively, and a clinical psychologist who conceded that Magwood suffered from paranoid schizophrenia and that he examined Magwood two years after the offense conduct and while he was strongly medicated. *Id.* By contrast, the unanimous opinion of the three physicians on the Lunacy Commission appointed by the trial court to examine Magwood was that Magwood was insane at the time of his admission to their hospital, at the time they issued their report, and probably at the time of the commission of the offense. *Id.* According to one psychiatrist on the commission, "Billy Joe Magwood falls into the category that would be called crazy in Stockholm; he would be called crazy in Calcutta, in Tokyo, any place. He is a schizophrenic. He is not in the borderline category." *Id.*

This court acknowledged that the jury's conclusion in the guilt phase of the trial that Magwood was not legally insane was due deference by the federal courts. "Accordingly, while in this Court's opinion the evidence seems particularly strong that petitioner was insane at the time of the offense, this issue is properly left to the state courts. The matter of the existence of

mitigating circumstances, however, is an altogether different matter." *Id.* at 227. Because the state court committed clear error in not finding the mitigating circumstances related to Magwood's mental state, this court granted habeas relief conditional upon a resentencing in which the mitigating circumstances are found to exist and considered in determining whether Magwood should receive a sentence of death or life without parole.

B. 1986 Resentencing

In 1986, the state trial court conducted a "complete and new" sentencing hearing, including "a new assessment of all of the evidence, arguments of counsel, and law" and a "new . . . opportunity for the parties to submit evidence." Sent. Tr., R. Tab 1, at R-25. The sentencing judge found that the mitigating factors found by this court were present, but that Magwood was not legally insane at the time of the crime and that his mental defect was not the sole cause of the murder. *Id.* at R-26. The court also found that Magwood knew right from wrong, and had the ability to refrain from killing the sheriff. *Id.* The trial court further found one aggravating factor: that Magwood killed a law enforcement officer because of official job-related acts. *Id.* at R-25. Magwood's attorney at resentencing, J.L. Chestnut, Jr., stated that the aggravating factor existed, submitting it in Magwood's proposed findings. *Id.* at R-17. After weighing the mitigating and aggravating circumstances as it found them, the sentencing court again sentenced Magwood to death by electrocution. *Id.* at R-28 to R-29.

The Alabama Court of Criminal Appeals affirmed the trial court, *Magwood v. State,* 548 So.2d 512 (Ala. Cr. App. 1988), and the Alabama Supreme Court, in turn, affirmed that decision, *Ex parte Magwood,* 548 So.2d 516 (Ala. 1988). The United States Supreme Court denied a petition for a writ of certiorari. *Magwood v. Alabama*, 493 U.S. 923 (1989). Magwood then filed for post-conviction relief under Alabama's former Criminal Procedure Temporary Rule 20 (now Ala. R. Crim. P. 32). His petition was denied by the trial court and by the Alabama Court of Criminal Appeals. *Magwood v. State*, 689 So.2d 959 (Ala. Cr. App. 1996).

Magwood then simultaneously filed two petitions in federal courts. First, he submitted a request for permission to file a second habeas petition challenging the 1981 judgment of conviction to the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied this second petition. *In re Magwood,* 113 F.3d 1544 (11th Cir. 1997). Second, he filed a habeas petition under 28 U.S.C. § 2254 in this court seeking relief from his 1986 sentence. This third petition is the subject of this opinion.

C. Procedural Posture of this Petition

This court split the proceedings on the current petition into two stages: Stage I (determining whether the claims were procedurally defaulted) and Stage II (considering the merits of the claims that were not procedurally defaulted). Having found at Stage I that some claims were procedurally defaulted, *Magwood v. Jones*, 472 F. Supp. 2d 1333 (M.D. Ala. 2007)

(Thompson, J.), this court now goes on to consider the claims that are not defaulted.

D. Alabama's Death-Penalty Scheme

In order to understand Magwood's claims, it is necessary to understand the development of Alabama's death-penalty scheme during the time period relevant here. There are essentially three eras of the Alabama death penalty during this period of time. *See generally* Colquitt, *The Death Penalty Laws of Alabama,* 33 Ala. L. Rev. 213 (1982). The first era involves the operation of Alabama's 1975 capital statute before the Alabama Supreme Court reinterpreted it in *Beck v. State*, 396 So.2d 645 (Ala. 1981), and *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981). Relevant parts of that statute, set forth in Title 13, Chapter 11 of the former Alabama Code, are attached as an appendix to this opinion. Under the 1975 statute, a defendant was charged with one of 14 aggravated offenses enumerated in former 1975 Ala. Code § 13-11-2(a), including § 13-11-2(a)(5), "The murder of any . . . sheriff . . . or peace officer of any kind . . . because of some official or job-related act or performance of such officer. . . ." The jury's function was to determine whether the defendant was guilty of the charged offense. If the defendant was guilty, the jury was "to fix the punishment at death." *Id.* § 13-11-2(a). At that point, "[n]otwithstanding the fixing of the punishment at death by the jury," *id.* § 13-11-4, the trial judge took over sentencing "to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole," *id.* § 13-11-3. Following a hearing, the court was required to weigh eight aggravating and seven mitigating circumstances, as enumerated in §§ 13-11-6 and -7, respectively. *Id.* §

13-11-4. Then, "[i]f the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include . . . [o]ne or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death." *Id.* Therefore, under the 1975 statute, the trial judge was the final sentencing authority, *Jacobs v. State,* 361 So.2d 640, 644 (Ala. 1978), and a sentence of death was permitted only upon her finding that aggravating circumstances in § 13-11-6 outweighed mitigating circumstances in § 13-11-7.

The second era involved the operation of the 1975 statute after its interpretation by the Alabama Supreme Court in two decisions, *Beck v. State* and *Ex parte Kyzer.* Following a series of decisions by the United States Supreme Court, including but not limited to *Beck v. Alabama,* 447 U.S. 625 (1980), the Alabama Supreme Court undertook an examination of the 1975 statute to ensure that it met constitutional standards. In *Beck v. State,* 396 So.2d 645 (Ala. 1981) (on remand), rather than require the state legislature to re-write the statute to conform to constitutional requirements recently set out in decisions of the United States Supreme Court, the Alabama Supreme Court found that the Alabama legislature intended to write a constitutional statute, 396 So.2d at 660, and, accordingly, "exercise[d] its inherent power to formulate guidelines which the Supreme Court of the United States has judicially determined to be constitutionally required in death cases," *id.* at 648. These "guidelines" included the requirement,

mandated by *Beck v. Alabama* itself, that the jury be permitted to consider lesser included offenses. *Id.* at 658-59. They also entailed a revised procedure that made the jury more involved in the sentencing phase of the case. *Id.* at 662-63. Under the procedures outlined in *Beck,* the trial would be "trifurcated" into a guilt phase, an advisory sentencing phase in which the jury was instructed on and required to weigh the aggravating and mitigating circumstances, and a final sentencing phase in which the judge was required to weigh the aggravating and mitigating circumstances. *Id.*

Whereas *Beck* reformulated various procedures for capital cases, *Ex parte Kyzer* addressed the aggravating circumstances the trial court was permitted to consider when it determined whether to sentence a defendant to death or life imprisonment without parole. In *Kyzer,* the Alabama Supreme Court posed the question of whether a defendant convicted of one of the 14 aggravated offenses enumerated in former 1975 Ala. Code § 13-11-2(a) could be sentenced to death without the trial court finding the existence of one of the eight enumerated aggravating circumstances in § 13-11-6.[1] The court acknowledged that a "literal and technical reading of the statute" precluded a death sentence in the absence of any aggravating circumstance in § 13-11-6. *Kyzer*, 399 So.2d at 337; *see* former 1975 Ala. Code § 13-11-4 ("If

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[1] In fact, the real question in *Kyzer* was whether a new trial was required in light of *Beck v. Alabama*, 447 U.S. 625, and the Alabama Supreme Court answered this question in the affirmative. The remainder of the opinion in *Kyzer*, including its discussion of the aggravating circumstances required for a sentence of death, is *dictum.*

the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include . . . [o]ne or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death."). However, and notwithstanding the language of the statute, the Alabama Supreme Court held that the legislature did not intend to limit the trial court's consideration of aggravating and mitigating circumstances to those enumerated in §§ 13-11-6 and -7. *Kyzer,* 399 So.2d at 338. Rather, the trial court could consider the aggravated *offense* enumerated in § 13-11-2 and averred in the indictment as an aggravating circumstance for sentencing purposes. *Id.* If the aggravation of the offense itself outweighs any mitigating circumstances, the court held, the trial judge could sentence the defendant to death even in the absence of an aggravating circumstance enumerated in § 13-11-6. *Id.*

According to the Alabama Supreme Court, this conclusion was required in order to resolve an "anomaly" in the statute resulting from the fact that "there is a corresponding aggravating circumstance for most, but not all, of the aggravated offenses." *Id.* at 334. If the jury found the defendant guilty of the aggravated offense but the trial judge could not find the existence of an aggravating circumstance, this "would be completely illogical and would mean the legislature did a completely useless act by creating a capital offense for which the defendant could not ultimately receive the death penalty." *Id.* at 337. Reasoning that it could "think of no reason why the

legislature would intend such a result," *id.*, and that it could not "assume that the legislature did a useless act," *id.* at 338, the court held that, notwithstanding this "literal and technical reading of the statute," *id.* at 337, the legislature intended to permit the trial judge to consider the aggravated offense averred in the indictment as an aggravating circumstance sufficient to impose the death penalty. *Id.* at 338.[2]

The third era of the Alabama death penalty began on July 1, 1981, when a new death-penalty statute took effect. The 1981 statute codified many of the

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[2] When the *Beck* decision was initially released, it apparently did not reflect the interpretation of the statute later announced in *Kyzer*. *Beck* was initially issued on December 19, 1980, but it was modified and reissued on March 6, 1981, the same day the court issued its decision in *Kyzer*. According to Judge Colquitt's law review article on the death-penalty laws of Alabama, the December 1980 version of *Beck* stated that "a finding by the jury that the defendant was guilty of committing the capital offense, along with a finding of one or more of the aggravating circumstances set out in 13-11-6, would be a sufficient finding which the jury could weigh in determining whether to impose the death penalty." Colquitt, *supra*, at 284-85 (quoting *Beck v. State*, No. 77-530 (original manuscript Dec. 19, 1980)). Subsequently, the Alabama Supreme Court modified its original opinion and issued the final version on March 6, 1981, the same day it decided *Kyzer*. According to the final version of *Beck*, "the jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance, even though the legislature did not include an aggravating circumstance in § 13-11-6 to correspond with the 'aggravation' made a part of each capital offense by § 13-11-2(a)." *Beck*, 396 So.2d at 663. To the best of this court's knowledge, the original version of *Beck* as quoted in Judge Colquitt's law review article has not been made a part of the record in this case.

changes made by the Alabama Supreme Court in *Beck*. But it also rejected *Kyzer's* rule on aggravating circumstances: "Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole." 1975 Ala. Code § 13A-5-45(f). Therefore, under the 1981 statute, the trial court could not sentence a defendant to death based on a finding that the aggravated offense constituted the only aggravating circumstance.

III. DISCUSSION

This court now turns to the merits of Magwood's claims.

A. Freakish, Arbitrary, and Disproportionate Imposition of the Death Penalty

Magwood claims that his death sentence was freakish, arbitrary, and disproportionate in violation of the Fourteenth Amendment's due process clause and the Eighth Amendment. Magwood points to three circumstances that he claims violated his constitutional rights: (1) the state courts' failure to conduct adequate "proportionality review" of his death sentence; (2) the sentencing court's reliance on "non-statutory and arbitrary factors" in imposing the death sentence; and (3) his mental illness, which he argues disqualified him from the death penalty.

1. Proportionality Review

Magwood claims that he was denied due process when the state appellate courts refused to vacate his

death sentence under Alabama's requirement of "proportionality review." In *Beck v. State,* 396 So.2d at 664, the Alabama Supreme Court held that, pursuant to the United States Supreme Court's decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), "proportionality review" would be required in Alabama: "Each death sentence should be reviewed to ascertain . . . whether similar crimes throughout the State are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant." *Beck,* 396 So.2d at 664. Magwood claims that, in his case, the Alabama appellate courts failed in their obligation to review his sentence for proportionality. He argues that, under Alabama law, the death penalty is never inflicted upon a person with an impaired mental condition such as his own and that no other capital defendant has been sentenced to death without the existence of an aggravating circumstance enumerated in former 1975 Ala. Code § 13-11-6.

This court must reject Magwood's proportionality claim. Under the federal-habeas statute, this court entertains an application for a writ of habeas corpus only on the ground that the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States. 28 US.C. § 2254(a). Proportionality review, however, is not required by the Constitution. *Pulley v. Harris,* 465 U.S. 37 (1984). In cases where state law requires proportionality review, federal-habeas courts should not review the substance of state courts' conclusions based on such review. *Mills v. Singletary,* 161 F.3d 1273, 1281-82 (11th Cir. 1998); *Moore v. Balkcom,* 716 F.2d 1511, 1518 (11th Cir. 1983).

It may be true that once state law requires proportionality review, as it does in Alabama, then the due process clause applies to the extent that the State cannot deny proportionality review without due process of law. *See Foster v. Delo,* 39 F.3d 873, 882 (8th Cir. 1994) (en banc); *Banks v. Horn,* 939 F. Supp. 1165, 1175 (M.D. Pa. 1996) (McClure, J.), *vacated on other grounds,* 126 F.3d 206 (3d Cir. 1997). However, also consistent with due-process principles, where the state court undertakes proportionality review "in good faith" and concludes that the proportionality principle was not violated, the Constitution does not require the federal court "to look behind that conclusion." *Walton v. Arizona,* 497 U.S. 639, 656 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584 (2002).

In this case, the Alabama Court of Criminal Appeals conducted proportionality review as required by *Beck. Magwood v. State,* 548 So.2d 512, 513 (Ala. Cr. App. 1988). This court, having reviewed the state court's opinion, sees nothing in the record to indicate a lack of good faith in that court's proportionality review. Accordingly, Magwood's proportionality claim at the habeas stage must be rejected.

2. Consideration of "Non-Statutory" Aggravating Factors

Magwood argues that his sentence violates the Constitution because the state court exceeded its statutory authority, resulting in a sentence that is arbitrary. First, Magwood contends that Alabama state law, during the time period relevant here, authorized a sentence of death only where the

sentencing authority found at least one circumstance listed in § 13-11-6 and that no such circumstance was found by Magwood's sentencing court. Second, Magwood contends that other "non-statutory" factors were unconstitutionally employed.

a.

First, Magwood argues that the finding of an aggravated offense set forth in § 13-11-2 alone, without a finding of an aggravating circumstance listed in § 13-11-6, is insufficient as a matter of state law to sentence him to death. He contends that the sentencing court, by sentencing him to death in the absence of a finding of an aggravating circumstance found in § 13-11-6, ran afoul of the constitutional requirement that a capital sentencing be based on the application of "clear and objective standards" which "channel the sentencer's discretion." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (internal citations omitted). He thus relies on the United States Supreme Court's prohibition on the arbitrary imposition of the death penalty in support of his argument. "Since *Furman,* [the capital sentencing] cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988).

Magwood, in his briefs, assumes that the aggravating factor cited by the sentencing judge was non-statutory, as his position is that only those aggravating circumstances listed in § 13-11-6 are

statutory aggravating factors, and he argues that there are no objective standards, by definition, in a system in which the sentencing authority can employ a non-statutory aggravating factor. In Magwood's view, the use of a factor that does not appear in § 13-11-6 as the sole aggravating factor is equivalent to the sole factor being impermissibly vague, *see Godfrey,* 446 U.S. 420; the imposition of the death penalty under such circumstances is unpredictable and therefore arbitrary and capricious.

As the above suggests, Magwood, throughout his brief, frames his argument as presenting the question whether a State may constitutionally sentence someone to death based on a single aggravating factor that is not found in the State's capital-sentencing statute. This is an open question, but it has been suggested that such a sentence might violate the Constitution. *See, e.g., Henry v. Wainwright,* 721 F.2d 990, 994 (5th Cir. 1983).

However, this constitutional question is not before this court. What is at stake here is not whether a non-statutory factor can, consistently with the Constitution, operate as an aggravating factor. By claiming that his sentence was unconstitutional because it was based on a non-statutory factor, Magwood relies on an unsound assumption about what the statutory factors under state law were. Alabama law, established by *Kyzer,* was that the aggravating factor found in Magwood's case—one of the aggravated offenses set forth in § 13-11-2—*was* statutory aggravating factor. Moreover, this factor is found in the statute; at base, Magwood disputes merely the state court's holding that the legislature did not intend

to require a finding of additional aggravating factor beyond the aggravated offense set forth in § 13-11-2.

As discussed above, the Alabama Supreme Court held in *Kyzer* that, as a matter of Alabama law, a sentencing body need not find an aggravating circumstance set forth in § 13-11-6 in order to impose a sentence of death. Rather, a court need only find that the aggravated offense (set forth in § 13-11-2) was an aggravating factor in the crime. "Applying traditional rules of statutory construction," the Alabama Supreme Court found in *Kyzer* that "the legislature intended to punish capitally defendants found guilty of offenses listed in § 13-11-2," even though the offense is not set forth as an aggravating circumstance in § 13-11-6. Magwood's argument hinges on this decision being wrong as a matter of state law. Thus, as a threshold matter, this case presents the question whether, when a state court interprets its own State's statute, this court can find that the state court's interpretation of its own law is wrong and hold that the state court's interpretation therefore violates the Constitution. This, this court cannot do.

As early as 1948, the Supreme Court stated that neither it nor other federal courts are "at liberty to conjecture that the [state] court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied." *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Since then, the Supreme Court and lower federal courts have consistently held that, while federal courts must enforce constitutional standards, they are not free to ignore or reinterpret state law, as

that law is interpreted by state courts. As the Supreme Court emphasized in *Wainwright v. Goode,* 464 U.S. 78, 84 (1983), and reemphasized in *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991), "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."

These decisions undermine the major premise of Magwood's argument: that the state court, in his sentencing, acted outside the authority of state law. To be sure, Magwood attempts to couch his argument about the state courts' interpretation of state law in constitutional standards, but the premise of his argument directly challenges the Alabama Supreme Court's interpretation of Alabama's 1975 death-penalty scheme. In order to prevail, Magwood would have to convince this court that *Kyzer* does not represent an authoritative interpretation of Alabama's capital-sentencing statute; that is, Magwood would have to convince the court that *Kyzer* is not state law, and that he has not done.

This court can, of course, review the consistency of the Magwood's sentencing with the United States Constitution.[3]

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[3] Magwood also does not appear to argue that the state courts' interpretation of § 13-11-6 was "an obvious subterfuge to evade consideration of a federal issue," the "rare circumstance" in which the federal courts are authorized to re-examine state-court determinations of state law. *Mullaney v. Wilbur,* 421 U.S. 684, 691, n.11 (1975). Even if he did, this court would not find that such a subterfuge occurred.

b.

Magwood also argues that the state sentencing court, in imposing the death sentence, improperly considered factors that, if employed, would be non-statutory factors, such as the fact that the victim was shot three times at close range with a pistol. Pet. at 56. It appears that Magwood has not pursued this line of argument in his merits brief. However, to the extent Magwood has not abandoned it, this court would not grant relief on that claim because the reasoning of *Goode* controls here, too. The Alabama Court of Criminal Appeals reviewed this claim at the postconviction stage and held that the sentencing court found the existence of only one aggravating circumstance. Insofar as this is a finding of fact, this court does not think it an "unreasonable" one. 28 U.S.C. § 2254(d)(2), *see also Goode,* 464 U.S. at 85.

Regardless of remarks the state trial court made during the sentencing colloquy about the circumstances and conditions of the offense conduct, nothing in the record suggests that the court based its sentence of death on factors other than the capital offense and its elements (which, in this case, constituted the aggravating circumstance) and its weighing of that aggravating circumstance against the mitigating circumstances it found existed in this case.

Furthermore, even if the sentencing court did consider one or more non-statutory aggravating factors in violation of *state law,* federal-habeas relief is available to Magwood only if he can demonstrate a violation of federal law. *See Goode,* 464 U.S. at 83-84; *see also* 28 U.S.C. 2254(d)(1). Magwood would face a

heavy burden in demonstrating that the consideration of such factors in violation of state law "so infects the balancing process created by the [Alabama] statute that it is *constitutionally* impermissible . . . to let the sentence stand." *Barclay v. Florida,* 463 U.S. 939, 956 (1983) (emphasis added). *See also Zant v. Stephens,* 462 U.S. 862 (1983) (rejecting a similar claim because "any possible impact [of the invalid aggravating factor] cannot fairly be regarded as a *constitutional* defect in the sentencing process" (emphasis added)). Accordingly, this court rejects Magwood's claim that the state-sentencing court considered non-statutory aggravating factors in violation of the Constitution when it sentenced Magwood to death.

3. Executing the Mentally Ill

In his merits brief, Magwood claims that it is a violation of the Eighth Amendment to execute a defendant who is as mentally ill as he is. Pet. Br. at 33-35. The State correctly points out that Magwood did not present this claim in his petition for habeas corpus, to which Magwood replies that it should be considered part of his "proportionality" claim because executing a person who had serious mental impairment at the time of the offense would be disproportionate to that defendant's culpability. *Id.* at 34.

Insofar as Magwood intends to fold this claim into his proportionality claim, it must be rejected for the reasons already stated in the court's discussion of proportionality review: this court's review is limited to whether the state court undertook proportionality

review in good faith, and this court finds that it did. *See* Subsection III.A.1, *supra.*

To the extent Magwood wishes the court to consider independently whether persons with mental impairments such as his can be executed under the Eighth Amendment, the court agrees with the State that no separate Eighth Amendment claim was raised in the petition for habeas corpus. Regardless of whether the court may consider a claim not raised in the petition, none of the Supreme Court cases cited in Magwood's brief, *Roper v. Simmons,* 543 U.S. 551 (2005); *Atkins v. Virginia,* 536 U.S. 304 (2002); *Ford v. Wainwright,* 477 U.S. 399 (1986), holds that the Eighth Amendment prohibits the execution of a person who committed his offense while under the influence of extreme mental or emotional disturbance or whose capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *See* R. Tab 1 at R-27 (finding that these mitigating circumstances existed). The federal-habeas statute prohibits the court from granting relief on any claim unless its adjudication in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under such a demanding standard of review, and in the absence of a holding by the United States Supreme Court that supports his claim, Magwood cannot obtain habeas relief on grounds that the Eighth Amendment prohibits the execution of a person who committed his offense while suffering from mental illness such as he was.

4. Conclusion

In sum, Magwood's claim that his death sentence was freakish, arbitrary and disproportionate in violation of due process and the Eighth Amendment is rejected. First, the federal courts' role in policing state-court proportionality review is extremely limited, and the state court did not deny proportionality review. Second, the Alabama Supreme Court's *Kyzer* decision precludes this court from considering whether the use of a non-statutory aggravating factor violated Magwood's constitutional rights because *Kyzer* is a definitive interpretation of state law. Third, the state appellate court has already determined that the sentencing court did not rely on non-statutory aggravating circumstances and that determination was not unreasonable, nor is it likely that the consideration of such factors would have rendered the death sentence unconstitutional. Last, the United States Supreme Court has not held that it is unconstitutional to execute someone for a crime committed while suffering from serious mental illness.

B. Retroactive Application of *Ex Parte Kyzer*

Next, Magwood claims that his death sentence violates the fair-warning requirement of the due process clause because it was based on an Alabama Supreme Court decision, *Ex parte Kyzer,* 399 So.2d 330 (Ala. 1981), that was decided after his offense and retroactively applied to his case. The principle of "fair warning" has "long been part of our tradition," *United States v. Bass,* 404 U.S. 336, 34 (1971), and is recognized as "fundamental to our concept of

constitutional liberty," *Marks v. United States,* 430 U.S. 188, 191 (1977). As early as 1931, Justice Holmes wrote: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States,* 283 U.S. 25, 27 (1931).

That principle has been cited and applied dozens of times by the United States Supreme Court. *See, e.g., Arthur Andersen LLP v. United States,* 544 U.S. 696, 703 (2005); *Rogers v. Tennessee,* 532 U.S. 451 (2001); *United States v. Lanier,* 520 U.S. 259, 265-66 (1997); *United States v. Aguilar,* 515 U.S. 593, 600 (1995); *Marks,* 430 U.S. at 191-92; *Douglas v. Buder,* 412 U.S. 430, 432 (1973) (per curiam); *Rabe v. Washington,* 405 U.S. 313, 316 (1972) (per curiam); *Bass,* 404 U.S. at 348; *Bouie v. City of Columbia,* 378 U.S. 347 (1964); *United States v. Harriss,* 347 U.S. 612, 617 (1954). According to the latest definitive statement of the fair-warning rule, due process prohibits the retroactive application of judicial interpretations of criminal statutes that are "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Rogers,* 532 U.S. at 461 (quoting *Bouie,* 378 U.S. at 354).

In this case, as the court will explain in more detail below, the fair-warning principle compels the court to grant Magwood habeas relief as to his death sentence. At the time Magwood committed his offense, given the findings of the sentencing court, state law did not allow for him to be sentenced to death. When

he was sentenced, however, the trial court retroactively applied a change in the law, made subsequent to Magwood's offense but before his trial, that permitted a death sentence in cases such as his. Such a sentence runs afoul of fairness, due process, and clearly established Supreme Court precedent.

1. Relevant Supreme Court Precedent: *Bouie* and *Rogers*

Magwood claims that he was denied due process when the sentencing court sentenced him to death without finding the existence of an aggravating circumstance under former 1975 Ala. Code § 13-11-6, thereby sentencing him to a punishment he could not have received under the law that existed at the time of his offense. The basic factual premises of Magwood's claim are correct. His offense conduct, the murder of Sheriff Grantham, occurred on March 1, 1979, more than two years before the Alabama Supreme Court decided *Ex parte Kyzer*. And the trial court whose sentence is challenged in the habeas petition now before the court "d[id] not find the existence of any . . . aggravating circumstance in section 13-11-6. . . ." R. Tab 1 at R-25. Consequently, the question before the court is whether the trial court's sentence of death on that basis is properly understood as a retroactive application of a subsequent judicial decision that denies Magwood due process of law.

As the parties have noted in their briefs, the relevant United States Supreme Court decisions are *Bouie v. City of Columbia,* 378 U.S. 347 (1964), and *Rogers v. Tennessee,* 532 U.S. 451 (2001). In *Bouie,* the Court held that the South Carolina Supreme Court

had violated due process in affirming the convictions of civil-rights "sit-in" protesters for violating that state's criminal-trespass statute. In a decision issued after the defendants' conduct but before affirming the convictions, the state supreme court had construed the statute, which on its face prohibited entry on another person's land after notice prohibiting such entry, to prohibit remaining on land after receiving notice to leave. 532 U.S. at 349-50 & n.2. On review, the United States Supreme Court noted "the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime," *id.* at 350, and stated that "a deprivation of the right of fair warning can result . . . from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language," *id.* at 352. "If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Id.* at 354 (internal quotation marks omitted).

Applying those principles, the Court found that neither the plain language of the statute nor prior South Carolina decisions interpreting it supported the application of the criminal trespass law to persons who remained on land after they were asked to leave. The Court therefore held that the challenged convictions contravened due process of law.

In *Rogers,* the question was whether the Tennessee Supreme Court's abolition of that State's common-law "year-and-a-day rule" could be retroactively applied to affirm the murder conviction for a homicidal act that occurred more than a year and a day before the death of the victim. On review of the

conviction, the United States Supreme Court disavowed *dicta* from *Bouie* suggesting that the fair-warning principle of the due process clause, as it applies to judicial decisions, is coextensive with the *ex post facto* clause as applied to legislative acts. Although the "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process," *id.* at 456, the "decision in *Bouie* was rooted firmly in well established notions of due process," and did not "incorporate jot-for-jot the specific categories" of retroactive legislative acts barred by the *ex post facto* clause, *id.* at 459. Instead, the "more basic and general principle of fair warning that *Bouie* so clearly articulated" should be applied to challenges to retroactive judicial decisionmaking. *Id.* Extending the strict rules of the *ex post facto* clause to all instances of judicial decisionmaking would "evince too little regard for the important institutional and contextual differences between legislative, on the one hand, and common law decisionmaking, on the other." *Id.* at 460.

Applying these principles to the retroactive abolition of the year-and-a-day rule in Tennessee, the Court held that the abolition of the rule, which was "widely viewed as an outdated relic of the common law," *id.* at 462, did not violate the fair-warning principle of the due process clause. The Court noted that the year-and-a-day rule was nowhere to be found in the statutory criminal code of Tennessee, and it had "only the most tenuous foothold" as part of the criminal law, including precedential case law, of that State. *Id.* at 464. In sum, the Tennessee court's retroactive abolition of the rule was not "unexpected and indefensible such that it offended the due process principle of fair warning articulated in *Bouie* and its

progeny." *Id.* at 466 (internal quotation marks omitted). The challenged conviction was therefore affirmed.

To summarize, *Rogers,* while not overturning *Bouie,* limited it to a considerable extent. *Rogers* made clear that the due process clause does not incorporate against judicial decisionmaking all the limitations that the *ex post facto* clause places on legislatures. *Rogers,* 532 U.S. at 458-59. The due process clause is not implicated by the retroactive application of every judicially-created change in the law that happens to be detrimental to a defendant. *Id.* at 460. Instead, due process is violated by such retroactive application only when the new judicial interpretation of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 462 (quoting *Bouie,* 378 U.S. at 354). Thus, if a judicial decision is a "routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense" rather than "a marked and unpredictable departure from prior precedent," *id.* at 467, then its retroactive application to offense conduct that occurred before the decision was made would not contravene the fair-warning principle of the due process clause.

2. *Bouie* Is Controlling

Faced with these two United States Supreme Court decisions, this court must now decide whether the retroactive application of *Ex parte Kyzer* is barred by *Bouie* or permitted under *Rogers.* This court concludes that, even taking into account the language

of *Rogers* that limits the scope of *Bouie, Bouie* governs the outcome in this case. In other words, the court concludes that the retroactive application of *Ex parte Kyzer* violated due process because it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie,* 378 U.S. at 354 (internal quotation marks omitted), *quoted in Rogers,* 532 U.S. at 461.

The principal difference between *Bouie* and *Rogers* is that *Bouie* concerned a "retroactive judicial expansion of narrow and precise *statutory* language," *Bouie,* 378 U.S. at 353 (emphasis added), whereas the retroactive judicial decision challenged in *Rogers* "involve[d] not the interpretation of a statute but an act of *common law* judging," *Rogers,* 532 U.S. at 461 (emphasis added). In this case, Magwood challenges the Alabama Supreme Court's expansive interpretation of a criminal statute, not any changes it made to a common-law rule.

The *Rogers* court, in assessing whether the abolition of the year-and-a-day rule was "unexpected and indefensible by reference of the law which had been expressed prior to the conduct in issue," based its decision on three considerations, none of which applies to *Kyzer*. First, "[t]he year and a day rule [was] widely viewed as an outdated relic of the common law," *id.* at 462, whereas the Alabama death-penalty statute construed by the Alabama Supreme Court in *Kyzer* was only a few years old. Second, "the year and a day rule ha[d] been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," *id.* at 463, whereas this court is unaware of other States' courts that, prior to

Magwood's offense conduct, had interpreted state statutes' aggravating-circumstances requirements to be non-binding on the sentencing judge. Third, "at the time of [Rogers's] crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee" and "did not exist as part of Tennessee's statutory criminal code," *id.* at 464, whereas at the time of Magwood's crime the aggravating-circumstances requirement was an express part of Alabama's statute and the court knows of no prior judicial decisions in Alabama that gave the aggravating-circumstances requirement "only the most tenuous foothold" as part of the law of that State.

In fact, numerous pre-*Kyzer* decisions by the Alabama Court of Criminal Appeals strongly imply or suggest that a defendant convicted of a capital offense could not, before *Kyzer*, be sentenced to death unless the trial court found the existence of at least one aggravating circumstance as enumerated in former 1975 Ala.Code § 13-11-6. For example, state courts held that the trial court could not base a sentence of death on an aggravating circumstance from § 13-11-6 that does little more than describe the aggravated capital offense from § 13-11-2. *Colley v. State*, 405 So.2d 374 (Ala. Cr. App. 1980); *Keller v. State*, 380 So.2d 926 (Ala. Cr. App. 1979). State courts also held that § 13-11-6 lists the *only* aggravating circumstances that could be considered by the sentencing judge. *Berard v. State*, 402 So.2d 1044 (Ala. Cr. App. 1980); *Tomlin v. State*, 443 So.2d 47 (Ala. Cr. App. 1979). These decisions, combined with a plain reading of the text of § 13-11-4, belie any notion that the aggravating-circumstances requirement had "only the

most tenuous foothold" as the law in Alabama prior to *Kyzer.*[4]

In contrast to the *Rogers* case, the circumstances of *Bouie* mirror those of this case in most salient respects. First, *Bouie* and this case both involve the judicial interpretation of *statutory* language, not the evolution of judge-made common law. Second, in both cases, the statutory language was precise as written, and did not appear, prior to the challenged state-court decision, to welcome the interpretation given by the judiciary. In *Bouie,* "[b]y its terms, the statute prohibited only 'entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry. . . .'" *Id.* at 356. Similarly, former 1975 Ala. Code § 13-11-4, by its own terms, required that "[i]f the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include . . . [o]ne or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death." Third, in both cases, subsequent acts of the state legislatures were revealing as to the meaning of the law prior to the judicial decision at issue: in *Bouie,* the Tennessee legislature enacted a statute criminalizing the defendants' conduct shortly after the sit-in

[4] Admittedly, *Keller* is the only one of these decisions that was issued prior to Magwood's offense conduct. However, the other three decisions did little more than confirm what *Keller* clearly implied and the text of the statute itself clearly stated: the aggravated offense from § 13-11-2 could not itself constitute the sole aggravating circumstance justifying a sentence of death.

occurred; conversely, in this case, the Alabama legislature overturned *Kyzer* in its 1981 death-penalty statute by creating a separate subsection that expressly states, "Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life without parole." 1975 Ala. Code § 13A-4-45(f).[5]

Fourth, in neither case did the retroactively applied judicial interpretation have support in state-court decisions prior to the offense conduct. In *Bouie,* the United States Supreme Court reviewed 95 years of state-court interpretation of the criminal-trespass statute and found no authority for the interpretation given by the South Carolina Supreme Court in the challenged case. 378 U.S. at 361. Although Alabama's 1975 death-penalty statute was not nearly as old as the South Carolina criminal-trespass statute, this court is aware of no published decision of an Alabama state court, prior to Magwood's offense, that permitted a death sentence where no aggravated circumstance as enumerated in § 13-11-6 had been found. As discussed, numerous pre-*Kyzer* decisions of the Alabama Court of Criminal Appeals strongly imply that the sentencing court must find the existence of at least one aggravating circumstance as enumerated in § 13-11-6 in order to sentence the defendant to death. *Colley v.*

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[5] In addition to the subsequent legislative enactment, a subsequent state-court decision implicitly recognized that *Kyzer* changed the law. *Ex parte Woodard,* 631 So.2d 1065, 1071 (Ala. Cr. App. 1993), cites *Kyzer* for the proposition that "under former capital offense statutes, death sentence could not be upheld where defendant was convicted of the intentional murder of three persons in one course of conduct, but no statutory aggravating circumstances existed."

State, 405 So.2d 374 (Ala. Cr. App.1 980); *Berard v. State,* 402 So.2d 1044 (Ala. Cr. App. 1980); *Tomlin v. State,* 443 So.2d 47 (Ala. Cr. App. 1979) ; *Keller v. State,* 380 So.2d 926 (Ala. Cr. App. 1979). And just as in *Bouie,* where the South Carolina court had cited two previous cases but the United States Supreme Court found those cases to be "simply irrelevant," *id.* at 357-58, in this case *Kyzer* cited two previous Alabama cases, *Evans v. State,* 361 So.2d 666 (Ala. 1978) and *Clements v. State,* 370 So.2d 723 (Ala. 1979), which this court has reviewed and can safely say are irrelevant as well, at least insofar as they do not address the question of whether a defendant can be sentenced to death absent the finding of an aggravating circumstance as enumerated in § 13-11-6.

If anything, *Clements* suggests that the Kyzer decision was entirely unforeseeable. *Clements,* which was decided shortly before Magwood's offense conduct, recognizes several "long-settled rules of construction," 370 So.2d at 725, prohibiting the expansive judicial interpretation of criminal statutes:

> "A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants."
>
> "Penal statutes are to reach no further in meaning than their words."
>
> "One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are

> not used technically, is not to be punished thereunder, merely because the act may contravene the policy of the statute."
>
> "No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused."

Id. (citations omitted). Applying these rules to former 1975 Ala. Code § 13-11-4 ("If the court imposes a sentence of death, it shall set forth in writing . . . findings of fact . . . which . . . include . . . [o]ne or more of the aggravating circumstances enumerated in section 13-11-6."), it seems beyond dispute that the judicial construction of that statute announced in *Kyzer* was "unexpected and indefensible by reference to the law which had been expressed prior to" Magwood's offense conduct. *Bouie,* 378 U.S. at 354 (internal quotation marks omitted), *quoted in Rogers,* 532 U.S. at 461.

3. Distinctions Between this Case and *Bouie* Are Immaterial

Admittedly, there is one aspect of this case that makes it look more like *Rogers* than *Bouie:* Magwood, like Rogers, undoubtedly committed a serious violent offense the criminality of which is not in question.[6] In *Rogers,* the retroactivity of the challenged state-court decision meant the difference between a conviction for

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[6] The State never expressly makes this argument but, in a footnote, reminds the court, "At no time was Magwood's conduct innocent in the instant case." Resp. Br. At 25 n.6.

murder and a conviction for some form of aggravated assault, and in this case the retroactivity of *Kyzer* means the difference between a sentence of death and a sentence of life without parole. In *Bouie,* by contrast, the defendants' conduct was innocent of any crime—and in fact, by most standards, heroic.

However, although there is some *dicta* in *Bouie* to suggest that the defendants' due-process claim was "particularly compelling where, as here, [their] conduct cannot be deemed improper or immoral," 378 U.S. at 362, there is no language in *Bouie* that limits its holding to conduct that is *malum prohibitum* as opposed to *malum en se.* As for *Rogers,* although the Court's opinion in that case does refer to *Bouie* as a case about "the constitutionality of attaching criminal penalties to what previously had been *innocent* conduct," 532 U.S. at 459 (emphasis added), the Court never implies that its basis for distinguishing *Bouie* had anything to do with the moral content of Rogers's conduct or the fact that his conduct was, if not murder, a serious crime.

In fact, the significance of such a distinction was more or less rejected by Justice Holmes in *McBoyle v. United States,* 283 U.S. 25 (1931): "Although it is not likely that a criminal will carefully consider the text of the law before he *murders* or *steals,* it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." 283 U.S. at 27 (emphases added). Accordingly, even though Magwood was guilty of a capital offense, as defined in former 1975 Ala. Code § 13-11-2, at the time he killed Sheriff Grantham, he had no fair warning

that his conduct, which was committed absent any aggravating circumstances as enumerated in former 1975 Ala. Code § 13-11-6, could subject him to a death sentence. He was entitled to fair warning of "what the law intend[ed] to do," *McBoyle,* 283 U.S. at 27—that is, execute him—if he killed Sheriff Grantham absent any aggravating circumstances as enumerated in former 1975 Ala. Code § 13-11-6.

The "innocent conduct" distinction should also be rejected in a case such as this one where the defendant is "innocent of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The United States Supreme Court, while acknowledging that "[t]he phrase 'innocent of death' is not a natural usage of those words," *id.* at 341, has stated that "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing . . . that there was *no aggravating circumstance* or that some other condition of eligibility had not been met," *id.* at 345 (emphasis added). Here, Magwood was not eligible for the death penalty under Alabama state law, given the sentencing court's findings, at the time he committed his offense because the sentencing judge found no aggravating circumstances under former 1975 Ala. Code § 13-11-6. Therefore, he is "actually innocent" of the death penalty, and the fact that he is otherwise guilty of capital murder is of no consequence under *Bouie* and *Rogers.*[7]

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[7] Magwood's innocence of the death penalty would also excuse, under the miscarriage-of-justice exception, any procedural default that would otherwise bar his claim. *Sawyer*, 505 U.S. at 335; 2 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 26.4, at 1369-71 (5th ed. 2005). Because the court has already adopted the magistrate judge's recommendation on other grounds

A similar distinction between this case and *Bouie,* and indeed between this case and *Rogers,* is that *Bouie* and *Rogers* involved challenges to the defendants' convictions, whereas this case involves a challenge to Magwood's sentence. It is unsurprising that the State does not argue that the fair-warning principle of the due process clause does not apply to sentencing, as there is nothing about *Bouie* or subsequent case law, and certainly nothing about the due-process principles animating *Bouie,* that would restrict the fair-warning rule in such a way.

Indeed, to so limit the due process principles animating *Bouie* would contradict the United States Supreme Court's *Apprendi*-related jurisprudence, whose reasoning points to the conclusion that retroactively applied aggravating factors in a death-penalty case are the functional equivalent of retroactively applied elements in a criminal offense. In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the Court held that under the Sixth Amendment any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. Of importance here, the *Apprendi* Court emphasized that it is of no relevance whether state law labels a particular fact an "element" of the offense or merely a "sentencing factor." *Id.* at 494. If the

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that this claim is not procedurally defaulted, Order of Jan.27, 2004 (doc. no. 69), at 2, and because the Supreme Court has instructed that the actual-innocence exception should not be invoked unless all other avenues of relief are unavailable, *Dretke v. Haley,* 541 U.S. 386, 393-94 (2004), the court need not invoke the miscarriage-of-justice exception to the procedural default rule in this case.

required finding exposes the defendant to an increase in punishment beyond what would be the maximum authorized statutory sentence absent the finding, then it is the "functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* n.19. The principles of *Apprendi* were applied to death sentences in *Ring v. Arizona,* 536 U.S. 584 (2002), which stated that "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' " 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19, meaning that any fact, such as an aggravating factor, on which the state law conditions the imposition of the death penalty must be found by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 589.

"There is no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes" an offense for purposes of the fair-warning principle of the due process clause. *Sattazahn v. Pennsylvania,* 537 U.S. 101, 111 (2003) (applying the *Apprendi/ Ring* principles to a double-jeopardy claim). That is, the significance of *Apprendi* and *Ring* for *Bouie* claims in death-penalty cases is not that juries, rather than judges, must find the "aggravating" facts that elevate the sentence for a capital offense from life without parole to death. Rather, *Apprendi* and *Ring* illustrate that enumerated aggravating circumstances, such as those in former 1975 Ala. Code § 13-11-6, operate as the "functional equivalent" of elements of an offense, which means that a death sentence based on the finding of aggravating circumstances that would not have authorized a death sentence at the time the

offense conduct occurred is the "functional equivalent" of a conviction based on the finding of elements that would not have constituted a crime at the time the offense conduct occurred—precisely the type of conviction that violates the fair-warning principle of the due process clause under *Bouie*. Consequently, where, as here, the defendant challenges the retroactive application of a judicial decision that makes him eligible for a death sentence where he would not have been statutorily eligible before, the fair-warning principle unquestionably applies.[8]

In sum, this case is not distinguishable from *Bouie* in any way that is material to Magwood's claim. The fair-warning principle applies here even though Magwood's conduct was not innocent and even though he challenges his death sentence rather than his conviction on the underlying capital offense.

4. Additional Arguments Are Unavailing

Briefly, the court will now address and reject five additional arguments, only three of which were raised

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[8] The court notes that the Eleventh Circuit has "assume[d] *arguendo*, without deciding," that the fair-warning principle applies to sentencing. *United States v. Duncan*, 400 F.3d 1297, 1307 n.12 (11th Cir. 2005). *Duncan*, however, involved a challenge to the retroactive application of the changes made to the United States Sentencing Guidelines by *United States v. Booker*, 543 U.S. 220 (2005), not aggravating factors in a capital sentencing statute. *See Webster v. Woodford*, 369 F.3d 1062, 1069 (9th Cir. 2004) (holding that *Bouie* applies to "judicial constructions of substantive elements of criminal law such as aggravating circumstances" in a capital case even though it "does not apply to sentencing schemes").

by the State, against granting Magwood relief on this claim.

a.

First, although neither party cites *Jackson v. Thigpen*, 752 F. Supp. 1551 (N.D. Ala. 1990) (Clemon, J.), *aff'd in relevant part & rev'd on other grounds sub nom. Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995), this court thinks it important to distinguish the holding in that case from Magwood's claim here. In *Jackson*, the district court rejected the habeas petitioner's claim that the retroactive application of *Kyzer* violated her right to fair warning under the due process clause. Jackson challenged the state court's "dual use" of the same fact (her prior conviction for second-degree murder) to support her conviction of an aggravated offense, former 1975 Ala. Code § 13-11-2(a)(13) ("Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime."), and to support the finding of an aggravated circumstance, *id.* § 13-11-6(2) ("The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person."). In *Jackson*, however, the aggravating circumstance found by the court was actually enumerated in § 13-11-6; it was not the aggravated offense enumerated in § 13-11-2 being used as an aggravating circumstance for sentencing purposes. The district court also noted that prior to *Kyzer*, the Alabama Supreme Court had allowed death sentences to stand where a single act supported both an element of the offense and an aggravating factor. *Jackson*, 752 F. Supp. at 1558. Based on these facts, the district court held that *Kyzer* "did not make any substantive change in Alabama law regarding the dual

use of a single prior criminal act and that result should have been anticipated." *Id.*[9]

The same cannot be said regarding *Kyzer's* effect on the dual use of a aggravated offense that is *not* enumerated as an aggravating circumstance in § 13-11-6. With regard to Jackson's claim, not only had the Alabama Supreme Court approved of numerous death sentences based on dual use of a single prior criminal act, but, in addition, the plain text of the statute permitted such dual use. The Alabama Court of Criminal Appeals' decisions setting aside death sentences based on such dual use had never been settled law, and, by permitting dual use in *Kyzer,* the Alabama Supreme Court more or less confirmed that the statute meant what it said. In contrast, *Kyzer's* other holding upended the literal meaning of the statute with respect to enumerated aggravating circumstances. Not only had prior court decisions implied that the court must find the existence of an aggravating circumstance enumerated in § 13-11-6, no court had ever approved a death sentence based on an aggravating circumstance that was found in § 13-11-2 but not in § 13-11-6.

In other words, *Kyzer* really involved two interpretations of the capital-sentencing procedures under the 1975 statute. First, it confirmed what was unsettled before: the sentencing court could consider

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[9] To the extent the *Jackson* court based its decision on the facts that the petitioner's offense conduct occurred after *Beck* and that language in *Beck* predicted language in *Jackson*, 752 F. Supp. at 1558, it may have overlooked the fact that relevant language in *Beck* was modified and released simultaneously with *Kyzer*. *See supra* note 2.

an aggravating circumstance from § 13-11-6 even if that aggravating circumstance was substantially the same, or was based on the same facts, as the aggravated offense from § 13-11-2 averred in the indictment. This first interpretation, which we might call the "dual-use" holding of *Kyzer,* was the issue the court faced in *Jackson v. Thigpen,* and the district court in that case rejected Jackson's claim that she did not have fair warning of *Kyzer's* dual-use holding. Second, *Kyzer* interpreted the statute to permit the sentencing court to consider an aggravating circumstance that did not even appear in § 13-11-6, so long as that aggravating circumstance was the aggravated offense from § 13-11-2 that was averred in the indictment. This second interpretation of the statute, as opposed to the dual-use holding, was a judicial expansion of the plain text of the statute and had no support in prior case law. The court is confident that by holding today that Magwood was denied fair warning in being sentenced to death absent the existence of any aggravating circumstance enumerated in § 13-11-6, it in no way undermines the district court's holding in *Jackson v. Thigpen* that the petitioner in that case had not been denied fair warning in being sentenced to death under the dual-use doctrine.

b.

Second, although the State does not raise a preclusion defense, the court thinks it important to point out the fact that this is not Magwood's first federal-habeas petition and consider whether his claim is barred under AEDPA's "successive petition" rule. Magwood's first habeas petition was before the federal

district court over 20 years ago, and this court denied the petition as to Magwood's conviction and granted the petition as to his death sentence. *Magwood v. Smith,* 608 F. Supp. 218 (M.D. Ala. 1985) (Hobbs, C.J.). At resentencing, Magwood again received a death sentence, and his habeas petition challenging the resentencing is now before this court.

From a review of this court's 1985 decision, it appears that Magwood did not raise, in his first habeas case, the fair-warning claim, even though he could have done so. At Magwood's first sentencing, the state court committed the *same* constitutional error identified here: it retroactively applied *Kyzer* to Magwood's case and sentenced him to death without finding the existence of any aggravating circumstance in former 1975 Ala. Code § 13-11-6. However, this court never addressed any fair-warning claim in its 1985 opinion, even though *Bouie's* fair-warning principle represented clear Supreme Court precedent at the time.

This raises the question of whether Magwood was precluded from raising the issue when challenging his resentencing. In habeas proceedings, federal courts are required to follow the statutory rules on "successive petitions" rather than the judge-made law on res judicata. AEDPA bars claims "presented in a second or successive habeas corpus application," except in very limited circumstances. 28 U.S.C. § 2244(b)(2). Because the answer to precisely what constitutes a second or successive petition is not clarified in AEDPA, courts must often interpret the statute to see if a specific claim is second or successive.

Here, the court concludes that Magwood's fair-warning claim is not a successive petition within the meaning of AEDPA. As this court discussed in a previous opinion in this case, *Magwood v. Jones,* 472 F. Supp. 2d 1333 (M.D. Ala. 2007) (Thompson, J.), the Eleventh Circuit has concluded that, under AEDPA, habeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge the underlying conviction and original sentence. *In re Green,* 215 F.3d 1195 (11th Cir. 2000) (per curiam); *see also* 2 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 28.3b(i), at 1412 (5th ed. 2005) ("When a petitioner files a second or subsequent petition to challenge a criminal judgment other than the one attacked in an earlier petition, it cannot be said that the two petitions are 'successive.'"). In this court's earlier opinion, it addressed the issue of whether Magwood's *Brady* claim as it related to his resentencing was successive to his *Brady* claim as it related to his underlying conviction. "Although the State suppressed the same evidence at his trial, the suppression at resentencing was an independent constitutional error that originated at the resentencing proceedings." *Magwood,* 472 F. Supp. 2d at 1338-39. Here, this court is presented with an analogous issue: Although the state court committed the same fair-warning error at Magwood's original sentencing, the fair-warning error at resentencing was an independent constitutional error—and the habeas petition on resentencing challenges a separate judgment. Therefore, the court concludes that Magwood's fair-warning claim is not successive within the meaning of AEDPA.

Having concluded that the claim is not barred as successive under AEDPA, the court need not consider whether some form of common-law *res judicata* might apply, *see Allen v. McCurry,* 449 U.S. 90, 94 (1980) (defining claim preclusion), because the State did not raise a claim-preclusion defense. *See Arizona v. California,* 530 U.S. 392, 410 (2000) ("[Where] the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. Those principles rank *res judicata* an affirmative defense ordinarily lost if not timely raised."(internal quotation marks, brackets, and citation omitted)); *Louisville & N.R. Co. v. M/V Bayou Lacombe,* 597 F.2d 469, 471 n.1 (5th Cir. 1979) (*res judicata* is an affirmative defense and as such is waivable).[10]

Furthermore, unlike in this court's consideration of the *Brady* issues in its previous opinion, *Magwood,* 472 F. Supp. 2d at 1338-43, here the law-of-the-case doctrine does not apply because this court did not decide the fair-warning claim in 1985. *See Arizona v. California,* 460 U.S. 605, 618 (1983) ("[T]he doctrine [of law of the case] posits that when a court *decides* upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."(emphasis added)). Accordingly, even though Magwood arguably could have, but did not, raise the fair-warning claim in his habeas petition challenging

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[10] In *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

his first conviction and sentencing, he is not precluded from raising it here.

c.

Third, the State argues that Magwood was given "fair warning" that he could be sentenced to death because his trial, sentencing, and resentencing all occurred subsequent to March 6, 1981, when the Alabama Supreme Court issued its decision in *Kyzer*. Resp. Br. at 24-25. This argument is without merit. Under the fair-warning principle of the due process clause, the relevant question is not whether the defendant will be surprised *in the courtroom* by the retroactive application of a novel judicial construction of a criminal statute, but whether such novel construction was unforeseeable at the time of the defendant's unlawful *conduct*. *See Bouie,* 378 U.S. at 354 ("If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the *conduct* in issue, it must not be given retroactive effect." (internal quotation marks omitted and emphasis added)). In fact, *Bouie* itself involved the retroactive application of a judicial decision, *City of Charleston v. Mitchell,* 239 S.C. 376, 123 S.E.2d 512 (1961), that had been issued prior to the state supreme court's decision affirming their convictions; the critical point was that *Mitchell* was decided subsequent to the *Bouie* defendants' conduct. *See Bouie,* 378 U.S. at 350 n.2.

In Magwood's case, the offense conduct occurred on March 1, 1979, and the Alabama Supreme Court issued *Ex parte Kyzer* on March 6, 1981. Therefore, as in *Bouie,* at the time of the offense conduct, Magwood

did not have fair notice that he could be sentenced to death absent at least one aggravating circumstance enumerated in former 1975 Ala. Code § 13-11-6.

d.

Fourth, the State continues to press its procedural-default defense, arguing that Magwood did not raise his fair-warning claim in state court. Resp. Br. at 21-23. Although this court has already adopted the magistrate judge's recommendation that the claim is not procedurally defaulted because the Alabama Court of Criminal Appeals denied it on the merits (doc. no. 69, overruling State's objection, doc. no. 61, to the magistrate judge's report and recommendation, doc. no. 59), this court will now address an additional reason why the State's procedural-default defense as to this claim is without merit.

Under the procedural-default rule, which is a component of both the adequate-and-independent-state-grounds and exhaustion doctrines, a habeas petitioner is procedurally barred from pursuing a claim either not raised in state court or correctly rejected in state court on state-law procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991); *Harmon v. Barton*, 894 F.2d 1268, 1270 (11th Cir. 1990). If a petitioner fairly presented his federal claim throughout state-court collateral proceedings, then the claim is exhausted and preserved for federal-habeas review even if the state court chooses not to address it. *Kelley v. Sec'y for Dep't of Corrections*, 377 F.3d 1317, 1345 (11th Cir. 2004); 2 Hertz & Liebman, *supra*, § 23.3b, at 1073.

Here, the question is whether Magwood raised his fair-warning claim in his Rule 20 state postconviction petition. A review of Magwood's Rule 20 petition and appellate brief reveals that he did. In the Rule 20 petition, Magwood alleges that the "trial court, . . . in applying and following an interpretation which was not rendered until after Petitioner's conduct in 1979, . . . violated Petitioner's constitutional rights including those secured by the Fifth, Eighth and Fourteenth Amendments and the prohibitions against *ex post facto* laws in the constitutions of the United States and Alabama." Seventh Amended Rule 20 Pet., R. Tab 21, at 21-22. Then, in the Rule 20 appellate brief to the Alabama Court of Criminal Appeals, Magwood again preserves the claim: "[T]he absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered Mr. Magwood's sentence unconstitutional under the 5th, 8th and 14th Amendments." Appellant Br., R. Tab 25, at 23.

By making these arguments in his state postconviction pleadings, Magwood exhausted his fair-warning claim and preserved it for federal-habeas review. The exhaustion requirement is "not so draconian or formalistic as to require petitioners to give a separate federal law heading to each of the claims they raise in state court to ensure exhaustion for federal review. [It] simply require[s] that petitioners present their claims to the state courts such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelley*, 377 F.3d at 1344-45. By arguing in state postconviction proceedings that the trial court violated Magwood's constitutional rights by

retroactively applying *Kyzer* to his case, Magwood fairly presented his fair-warning claim to the state courts and thereby preserved it for federal-habeas review.

e.

Last, the State argues that *Kyzer* was not unexpected and indefensible by reference to prior state law because the Alabama Supreme Court merely applied "traditional rules of statutory construction" to discover what the legislature intended. Resp. Br. at 30. According to the State, the *Kyzer* court was merely rectifying an "anomaly" in the statute, 399 So.2d at 334, an anomaly that caused a "literal and technical reading of the statute" to be "completely illogical and would mean the legislature did a completely useless act," *id.* at 337. Because a literal reading would entail such a bizarre result, the State essentially argues, the *Kyzer* decision-like the abolition of the year-and-a-day rule in Tennessee—"was a routine exercise of [judicial] decisionmaking in which the court brought the law into conformity with reason and common sense." *Rogers,* 532 U.S. at 467. Although this court's role is not to second-guess the state court's authoritative opinion as to what the state legislature intended when it enacted the 1975 capital statute, the court cannot accept the State's argument that *Kyzer* was little more than the "appl[ication of] traditional rules of statutory construction," Resp. Br. at 30.

Two considerations animate this court's conclusion on this point. First, as previously discussed, the traditional rules of statutory construction, as recognized by the Alabama Supreme Court in

Clements v. State, require that criminal statutes be strictly construed in defendants' favor and reach no further in meaning than their words. 370 So.2d at 725. It therefore appears that the *Kyzer* decision contravened the principles of statutory construction as recognized by the Alabama Supreme Court, notwithstanding the *Kyzer* court's view that it was merely interpreting legislative intent. *Kyzer*, 399 So.2d at 338.

Second, the court cannot help but disagree with the Alabama Supreme Court's *dicta* in *Kyzer* that the literal reading of the statute "would be completely illogical and would mean the legislature did a completely useless act by creating a capital offense for which the defendant could not ultimately receive the death penalty." *Kyzer*, 399 So.2d at 337. In fact, the statute expressly provides for a sentence of *life without parole* for any defendant convicted of an aggravated *offense* but for whom the aggravating *circumstances* in § 13-11-6 do not outweigh the mitigating circumstances. *See* former 1975 Ala. Code § 13-11-4. The court is aware of no other criminal offense in the Alabama code at the time of Magwood's conduct, other than a capital offense enumerated in § 13-11-2, that could have resulted in a sentence of life imprisonment without parole. If the legislature, in enacting the 1975 statute, had wished to specify certain offense conduct that was severe enough to warrant life imprisonment without parole but not severe enough to warrant a death sentence, then it would not be "completely illogical" or a "completely useless act" to allow for the possibility that a defendant could be convicted of a capital offense under § 13-11-2 but, because of the lack of aggravating

circumstances as enumerated in § 13-11-6, not be sentenced to death.

Again, this court is in no position to reject the Alabama Supreme Court's authoritative opinion as to the legislative intent underlying the statute; the court merely thinks it important to point out that the conclusion it drew in *Kyzer* was far from an inevitable interpretation of a statute and that the statute would not necessarily be nonsensical without the *Kyzer* gloss. Consequently, *Kyzer* was far from "a routine exercise of [judicial] decisionmaking in which the court brought the law into conformity with reason and common sense," *Rogers,* 532 U.S. at 467, and it was far from an inevitable application of well-accepted canons of statutory interpretation. It was a substantive change in the law of which Magwood did not have "fair warning." For that reason, Magwood's death sentence violates the due process clause of the Fourteenth Amendment and his petition for habeas corpus is due to be granted on that ground.[11]

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[11] The court notes that Magwood's counsel, at the resentencing hearing, essentially conceded that the court could sentence Magwood to death without finding an aggravating circumstance in former 1975 Ala. Code § 13-11-6. R. Tab 1 at R-17 to -18 ("We say to Your Honor, as we did in some proposed findings that we submitted to you, that the capital offense itself is an aggravating circumstance and that this Court has every right to consider it as an aggravating circumstance."). The State, aside from generally renewing its already-rejected procedural-default defense, makes no independent argument that Magwood's due process rights were not violated because his attorney expressly conceded the issue. However, to the extent that the defense attorney's statement may undermine Magwood's subsequent claim that his death sentence violated due process, the question becomes whether Magwood was denied ineffective assistance of counsel in

C. Purported Non-Compliance with the Writ of Habeas Corpus

Magwood next argues that the state-court findings at the 1986 resentencing were "incompatible" with this court's 1985 conditional grant of his habeas petition. *Magwood v. Smith,* 608 F. Supp. 218 (M.D. Ala. 1985) (Hobbs, C.J.), *aff'd,* 791 F.2d 1438 (11th Cir. 1986).

The controversy here has its roots in the failure of the original sentencing judge to find two statutory mitigating factors, and this court's decision that this failure made resentencing necessary. The 1981 sentencing judge failed to find that Magwood was, at the time of the crime, "under the influence of extreme mental or emotional disturbance," 608 F. Supp. at 225 (citing § 13-11-7(2)); the judge also failed to find that Magwood was "substantially impaired" in his "capacity to . . . appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id.* (citing § 13-11-7(6)). This court found that the "evidence of the existence of [these] mitigating factors . . . is so overwhelming as to make the trial court's rejection of their existence clearly erroneous." *Id.* at 226. However, this court also wrote that the existence of these mitigating factors did not mean that Magwood was legally insane under Alabama law:

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violation of the Sixth Amendment. *Cf. Murray v. Carrier,* 477 U.S. 478, 488 (1986) (recognizing ineffective assistance of counsel as an independent basis for relief where it is cause for procedural default). Magwood raises an ineffective-assistance claim as it related to the *Kyzer* issue in the instant petition, and the court will consider it *infra* at Subsection III.F.3.

> "The evidence with respect to petitioner's insanity as that legal concept is defined under Alabama law may have been sufficiently in conflict to make it a jury question. . . . Accordingly, while in this Court's opinion the evidence seems particularly strong that petitioner was insane at the time of the offense, this issue is properly left to the state courts. The matter of the existence of mitigating circumstances, however, is an altogether different matter."

Id. at 227. In other words, this court specifically found that, while the evidence compelled a finding of the mitigating factors recited above, it did not compel a finding that Magwood was insane. Therefore, this court did not mandate that the state court, at resentencing, find Magwood insane, and the state court's decision not to do so did not violate this court's writ.

D. Failure to Empanel a Jury at Resentencing

Magwood claims that his due-process interests were violated by another purported violation of Alabama law: the failure to empanel a jury in his 1986 resentencing. In support of this contention, he cites *Hicks v. Oklahoma,* 447 U.S. 343 (1980), and *Ex parte Williams,* 556 So.2d 744 (Ala. 1987). Neither case establishes that Magwood had a due-process interest in the empaneling of a jury.

In *Hicks,* the issue was whether, where an underlying sentencing law was declared unconstitutional after a defendant's sentencing, the

defendant had a liberty interest in the empaneling of a jury to redetermine the sentence. The United States Supreme Court held that, because there was error in the jury process (the jury sentenced the defendant based on a law that was not permissible under the State's constitution), the defendant did have such an interest, even though the jury could have sentenced him to the same amount of time under a constitutional sentencing scheme. *Hicks,* however, is unhelpful to Magwood. In this court's 1985 decision, no error was assigned to the jury process; this court's habeas order addressed only the state judge's findings.

Putting aside the question whether, because *Ex parte Williams* applies to a later version of Alabama's death-penalty statute, it even applies here, that case does not help Magwood either. In *Williams,* the Alabama Supreme Court held that "the errorless application by the court of its part [of sentencing] does not cure the erroneous application by the jury of its part." 556 So.2d at 745. This case does not stand for the principle, as Magwood contends, that the defendant has an interest in a jury being empaneled for resentencing even where the jury's recommendation is not assigned error; rather, it stands for the principle that, where the *jury* process is flawed, the *judge* cannot correct the flaw. As stated, with its 1985 habeas decision, this court did not find that the jury process was flawed.

E. Involuntary Medication

Magwood claims that he was denied due process of law because he was involuntarily medicated throughout his trial, sentencing, and resentencing. In

Sell v. United States, 539 U.S. 166 (2003), the Supreme Court held that the "Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179. *See also Riggins v. Nevada,* 504 U.S. 127 (1992). Here, Magwood argues that "there are serious questions whether the State's forced medication . . . deprived him of Due Process at his resentencing, and should be explored in discovery and at an evidentiary hearing." Pet. Br. at 70.

The magistrate judge previously recommended against an evidentiary hearing, and this court adopted that recommendation. Order of Jan. 27, 2004 (doc. no. 69). Furthermore, discovery in this case is complete. The question, then, is whether there is evidence in the record to support Magwood's claim that he was administered antipsychotic drugs against his will in such a way that would implicate his due process rights at resentencing.

Magwood does not point to any evidence in the record to support such a claim, and this court finds none. *Sell* clearly permits involuntary medication when certain conditions are met, and Magwood produces no evidence to suggest that such conditions were not met in his case. In fact, he produces no evidence of *involuntary* medication in the first place.

Moreover, to the extent Magwood argues that his competence at resentencing was "[f]abricated" by his medication, Pet. Br. at 69, he has also failed to establish that there was a "bona fide doubt" as to his competency during resentencing. *Watts v. Singletary,* 87 F.3d 1282, 1287 (11th Cir. 1996); *see also id.* at 1290 ("Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity of the petitioner." (internal brackets and quotation marks omitted)). Accordingly, the court rejects Magwood's involuntary-medication claim.

F. Ineffective Assistance of Counsel

This court now turns to Magwood's claim that his counsel at the 1986 resentencing was ineffective in violation of the Sixth Amendment. Magwood argues that his counsel, J.L. Chestnut, was deficient in a variety of ways. First, he argues that his attorney failed to investigate and present important mitigating evidence at the resentencing. Second, he argues that his attorney should have argued that the state court could not sentence him to death on the basis of a non-statutory aggravating factor. Third, he argues that his attorney should have argued that the retroactive application of *Ex parte Kyzer* violated the Constitution.

In considering Magwood's claim, the court is mindful of the strict standards governing a determination of the ineffectiveness of counsel,

particularly on habeas review of a state-court decision. It is certain that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). It is also true that counsel's role in a capital sentencing is to "ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687. However, this court's review of counsel's performance is strictly constrained. The Eleventh Circuit Court of Appeals has repeatedly held that, in the context of ineffective assistance of counsel, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Waters v. Thomas,* 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc)).

There are two factors that come into play in determining ineffectiveness. First, in order for counsel to be ineffective within the meaning of the Constitution, counsel's performance must not be "reasonable [ ] under prevailing professional norms," *Strickland,* 466 U.S. at 688, within the "'wide range of reasonable professional assistance.'" *Chandler,* 218 F.3d at 1313 n.12 (quoting *Waters,* 46 F.3d at 1518). The United States Supreme Court and the Eleventh Circuit have, in particular, stressed that counsel's performance need not be flawless, and that factors such as resource and time constraints must be taken into account in evaluating counsel's performance. *Id.* at 1314 n.14. Further, the court may not deem counsel's performance ineffective because it would have chosen a different strategy at trial; the court

must defer to counsel's strategic decisions. *Id.* The petitioner bears the burden of proving that "counsel's challenged action was not sound strategy," and counsel's competence is presumed. *Id.* at 1315 n.15.

Second, the petitioner must demonstrate that by his counsel's failure to employ a reasonable strategy, he was "deprive[d] of a fair trial, a trial whose result is reliable," *Strickland,* 466 U.S. at 687. Ordinarily, the petitioner must show a reasonable probability that, but for errors of counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* at 694.

The state court found that Magwood's counsel was adequate; as with every other claim, this court may overturn that conclusion only if it is a contrary to, or an unreasonable application of, federal law established by the United States Supreme Court, or if it was based on an unreasonable determination of facts in light of the evidence presented to the state court. 28 U.S.C. § 2254.

With these standards in mind, this court turns to the substance of Magwood's ineffective-assistance claim. This court finds that, as to Magwood's arguments that counsel should have further investigated and presented evidence of his schizophrenia and that counsel should have argued that the trial court employed a non-statutory factor, the state court's determinations were not unreasonable. However, the state court did make one unreasonable determination as to ineffectiveness of counsel: the finding that Magwood's counsel was

adequate, although he misstated the federal law of due process.

1. Failure to Investigate and Present Mitigating Evidence

Magwood argues that his counsel unreasonably failed to investigate and present evidence of mitigating circumstances. Specifically, he argues that his counsel did not discover "the most direct and convincing" evidence of his mental illness, such as that of psychological trauma sustained during Magwood's service in Vietnam and letters to the Veterans Administration, or other evidence that would have demonstrated his paranoid schizophrenia.

While presentation of this evidence might have been helpful to Magwood, the Court of Criminal Appeals found that it would have been cumulative, 689 So.2d at 967, and that not presenting it was therefore reasonable. This court cannot say that the Court of Criminal Appeals was incorrect.

As the Eleventh Circuit stated in *Marquard v. Secretary for Department of Corrections,* 429 F.3d 1278, 1307 (11th Cir. 2005), "counsel is not required to present cumulative evidence." *See also Van Poyck v. Dept. of Corrections,* 290 F.3d 1318, 1324 n.7 (11th Cir. 2002) ("A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative."). In *Maquard,* the petitioner argued that counsel should have presented the testimony of members of his family to the effect that he was abused as a child and that he had a history of

drug use. Both the state court and the Eleventh Circuit found that counsel's presentation of the testimony of a licensed psychologist noting these factors was adequate. In Magwood's case, the evidence would have contributed even less to his cause: it would have added little to evidence presented at Magwood's original sentencing which included the unanimous opinion and testimony of the members of the Lunacy Commission confirming that Magwood "is a schizophrenic." As one member of the commission stated, Magwood "'would be crazy'" anywhere, and "'is not in the borderline category.'" *Magwood v. Smith*, 608 F. Supp. at 226-27. The evidence might have provided different sources for the conclusion that Magwood suffered from schizophrenia, but would still only have been cumulative, as it would have presented nothing that had not been covered by other testimony.

As to Magwood's contention that counsel's investigation of mitigating evidence regarding his insanity was unreasonable, while it is true that there is a duty to conduct a reasonable investigation, *Wiggins v. Smith*, 539 U.S. 510 (2003); *Weidner v. Wainwright*, 708 F.2d 614 (11th Cir. 1983), counsel is not ineffective for failing to conduct more than a reasonable investigation. The key is whether "reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 534 (internal citations omitted). Counsel's decision not to investigate further cannot be called unreasonable. In *Wiggins*, counsel failed to investigate and present any evidence at all of petitioner's horrifying childhood including his history of having been sexually abused. Here, given that overwhelming evidence of Magwood's schizophrenia had been presented to, and considered

by, the trial court, the lack of further investigation into his schizophrenia was not unreasonable.

2. Failure to Argue that the Aggravating Factor Was Non-Statutory

Magwood next contends that his counsel was ineffective for failing to argue that the aggravating factor employed in his case was non-statutory, and could not, therefore, have been employed, under state law, in sentencing Magwood to death. This claim is without merit. As this court has stated, the Alabama Supreme Court determined in *Ex parte Kyzer* that the defendant's aggravated offense in § 13-11-2 was a statutory aggravating factor. Thus, the argument that the death sentence based on an aggravating factor found in § 13-11-2 was not based on a statutory factor was bound to be unavailing under state law. It could not have been unreasonable for counsel not to have made an [*sic*] such an argument; petitioner also could not show prejudice from such a failure, given that the argument is without merit.

3. Failure to Argue that the Retroactive Application of *Ex parte Kyzer* Violated Due Process

Finally, Magwood argues that his counsel was ineffective because he failed to argue to the sentencing court that the retroactive application of *Kyzer* to his case was a violation of the due process clause. This court agrees.

As previously discussed, the state trial court violated the fair-warning component of the due process clause by retroactively applying *Ex parte Kyzer,* 399

So.2d 330 (Ala. 1981), to his case. Prior to *Kyzer,* and at the time of Magwood's offense, a capital defendant could not be sentenced to death unless the court found the existence of at least one statutory aggravating circumstance as enumerated in former 1975 Ala. Code § 13-11-6. *Kyzer* reinterpreted the state statute to allow a death sentence based on a finding that the aggravated offense under § 13-11-2, standing alone and without any aggravating circumstances under § 13-11-6, outweighed all mitigating circumstances that might exist. But, as stated, because *Kyzer* was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964), (internal quotation marks omitted), *quoted in Rogers v. Tennessee,* 532 U.S. 451, 461 (2001), it could not, consistently with due process, be retroactively applied to Magwood's case.

At the resentencing hearing, however, Magwood's counsel stated that the court could sentence Magwood to death without finding an aggravating circumstance in former 1975 Ala. Code § 13-11-6. Defense counsel stated as follows: "We say to Your Honor, as we did in some proposed findings that we submitted to you, that the capital offense itself is an aggravating circumstance and that this Court has every right to consider it as an aggravating circumstance." R. Tab 1 at R-17 to -18. The court must now determine whether this statement by defense counsel, and his concomitant failure to argue that using the capital offense itself as an aggravating circumstance would violate due process, constituted ineffective assistance of counsel.

The court begins with the first inquiry under *Strickland,* whether counsel's performance was deficient. Under *Strickland,* the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689 internal quotation marks omitted); *see also Chandler,* 218 F.3d at 1314. However, while courts generally defer to strategic decisions, the Eleventh Circuit Court of Appeals has held that counsel's "choice of tactic must be reasonable under the circumstances," and that misstating the law is not a reasonable trial strategy. *Cave v. Singletary,* 971 F.2d 1513, 1518 (11th Cir. 1992).

Here, by expressly stating that the trial court could sentence Magwood to death using the aggravated offense of which he was convicted under § 13-11-2 as the sole aggravating circumstance justifying the death penalty, defense counsel misstated the law as it was clearly established by United States Supreme Court precedent in *Bouie.* This court suspects that defense counsel was not aware that Magwood had a meritorious fair-warning claim. However, even assuming for the sake of argument that counsel's statement was a strategic decision,[12] such a strategy was an unreasonable one because it misstated the law to Magwood's detriment.

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[12] Whether it was a strategic decision or an oversight does not affect this court's evaluation of counsel's performance.

The court wishes to stress that defense counsel's failure was not only in failing to argue that Magwood was, under *Bouie,* ineligible for the death penalty unless an aggravating circumstance enumerated in § 13-11-6 was found; rather, he affirmatively stated to the court, and submitted as part of his proposed findings, that Magwood could be sentenced to death on the basis of the § 13-11-2 aggravated offense alone. That is, counsel did not simply make an error of omission—an error that would be highly unfortunate but would perhaps survive the strong presumption that it was a strategic decision; rather, counsel affirmatively argued a position that was detrimental to his client and a clear misstatement of federal constitutional law. Under *Cave,* this is enough to overcome the strong presumption that, even if this could be considered defense counsel's "strategy," such strategy was not reasonable, and Magwood's representation was seriously deficient.

In *Cave,* the petitioner's attorney essentially conceded that the State had proven its case as to guilt. 971 F.2d at 1517. Defense counsel appeared not to understand that her client could be convicted of felony murder if he participated in a robbery, and so argued to the jury that, although he committed the robbery, he was not guilty of felony murder. *Id.* at 1518. On habeas review, the Eleventh Circuit was convinced that Cave's attorney simply did not understand the law, but assumed, for the sake of argument, that she had made a strategic decision to misstate the law. *Id.* Although in Magwood's case, the incorrect admission concerned eligibility for the death penalty rather than guilt of the crime, and the argument was made to the judge rather than the jury, the underlying principle is

the same as the one in *Cave:* an attorney's strategy (assuming that it is a strategy) to mislead the decisionmaker on a matter of law is not a reasonable strategic decision. In particular, a misstatement of law that works to the client's detriment is clearly unreasonable as a matter of professional conduct.

The court now proceeds to the second inquiry under *Strickland,* whether counsel's unreasonably deficient performance prejudiced the defense. It is clear that Magwood was prejudiced by his counsel's misunderstanding and affirmative misstatement of the law. As stated, Magwood had a due-process right, under *Bouie,* not to be sentenced to death absent the court finding at least one aggravating circumstance as enumerated in § 13-11-6. The sentencing court found no such aggravating circumstance but sentenced Magwood to death nonetheless. Thus, if counsel had been able to argue successfully that a death sentence violated the fair-warning principle of the due process clause, the outcome of the case would surely have been different.

While this court is aware that outcome determination does not constitute prejudice without attendant unfairness, *Lockhart v. Fretwell,* 506 U.S. 364 (1993), here there is undoubtedly unfairness and "depriv[ation] of the defendant of a[ ] substantive or procedural right to which the law entitles him." 506 U.S. at 364. Here, as stated, Magwood was deprived of the right to fair warning that his conduct could subject him to the death penalty. Accordingly, Magwood has established that he was prejudiced by his attorney's deficient performance at resentencing.

The court now addresses whether the state court was unreasonable in rejecting Magwood's ineffectiveness claim. 28 U.S.C. § 2254. First, because the state appellate courts did not find that the trial court committed constitutional error under *Bouie* in retroactively applying *Kyzer* to Magwood's case, it is unsurprising that they also did not find that Magwood's counsel was ineffective for effectively conceding that such retroactive application of *Kyzer* was permissible. This court's conclusion that defense counsel was ineffective is based, in part, on its conclusion that the retroactive application of *Kyzer* contravened due process. Had the state court correctly concluded that Magwood's sentence violated the fair-warning principle of the due process clause, it might well have reasonably concluded that Magwood's counsel was ineffective for misstating the law as to that issue at the resentencing hearing.

The state court appears to have had no occasion to consider the *Bouie* retroactivity issue, however, as it reasoned, instead, that the federal court in its first grant of habeas relief, *Magwood v. Smith,* 608 F. Supp. 218, 225 (M.D. Ala. 1985) (Hobbs, C.J.), *aff'd,* 791 F.2d 1438 (11th Cir. 1986), imposed no obligation on the sentencing court other than finding the two mitigating circumstances. *Magwood v. State,* 689 So.2d 959, 967 (Ala. Cr. App. 1996) ("[T]he appellant's complaints that his attorney . . . failed to challenge the trial court's consideration of a nonstatutory aggravating circumstance were matters outside the direction of what was to be considered by the resentencing court."). It is not clear how the Alabama court's reasoning fits into the two-pronged performance-and-prejudice scheme that the United States Supreme Court has set

forth for the evaluation of the ineffectiveness of counsel in death cases. *See Strickland,* 466 U.S. at 687. However, whether the Alabama court meant that it was not unreasonable professional behavior to decline to challenge an aggravating factor under these circumstances, or whether the Alabama court meant that no prejudice was caused, the court's holding was unreasonable.

The Alabama court's implied holding is that counsel's behavior was not ineffective because, essentially, the lawyer had no substantive role in the resentencing. This conclusion is unreasonable, whether it is regarded as a legal issue or a factual issue. This holding is not consistent with the legal requirements, clearly established by the United States Supreme Court, that individualized consideration of the aggravating and mitigating factors is required, *Zant v. Stephens,* 462 U.S. 862, 879 (1983). It is also not consistent, factually, with what actually happened in the trial court. The trial court at resentencing conducted—and specifically, repeatedly and emphatically said that it was conducting—an independent and full finding and reweighing of the aggravating and mitigating circumstances. R. Tab 1 at R-25 ("This Court conducted a new sentencing hearing and offered the parties the opportunity to submit evidence, argument and briefs . . . The present judgment and sentence has been the result of a complete and new assessment of all of the evidence, arguments of counsel, and law."); *id.* at R-27 ("The Circuit Court as stated has given the oral testimony and documents a complete and new assessment."). The Court of Criminal Appeals acknowledged that the trial court did so, *Magwood v. State,* 548 So.2d 512, 514

(Ala. Cr. App. 1988), and it is clear from the record that the trial court also independently found mitigating and aggravating circumstances. R. Tab 1 at R-27. Given the fact that the sentencing court conducted a "complete and new assessment" of the aggravating circumstances, mitigating circumstances, arguments of counsel, and law, it cannot be reasonably concluded either that counsel's performance was adequate under the circumstances or that counsel's error resulted in no prejudice to Magwood's case.

Thus, the Alabama court's finding that counsel's performance was adequate because this court only ordered a resentencing court to find the mitigating circumstances is unreasonable whether as a matter of clearly established law set forth by the United States Supreme Court or as a matter of fact, that is, as a matter of what actually happened.

Accordingly, the court finds that the state courts' rejection of Magwood's ineffectiveness claim was unreasonable and that habeas relief is due to be granted.

IV. CONCLUSION

For the foregoing reasons, this court will grant Magwood's habeas petition on his fair-warning and ineffective-assistance claims and deny it on the other claims. The murder of Sheriff Grantham was undeniably a horrific event; it was a terrible crime against the Sheriff, his family, and the citizenry at large. However, the fundamental requirements of due process and the right to counsel apply even to those convicted of the most serious crimes. The court cannot

ignore that due process and the right to effective assistance of counsel were denied in Magwood's case, which is why his death sentence must be vacated.

An appropriate judgment will be entered.

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Petitioner Billy Joe Magwood's petition for writ of habeas corpus (doc. no. 1) is granted on his fair-warning and ineffective-assistance claims and is denied on all other claims.

(2) The sentence of petitioner Magwood is vacated.

(3) The State of Alabama has 90 days from the date of this judgment to resentence petitioner Magwood.

It is further ORDERED that costs are taxed against respondents Grantt Culliver, Richard F. Allen, and Troy King, for which execution may issue.

The clerk of this court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

APPENDIX

CHAPTER 11
DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE

Sec. 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

13-11-5. Conviction and sentence of death subject to automatic review.

13-11-6. Aggravating circumstances.

13-11-7. Mitigating circumstances.

13-11-8. Appointment of experienced counsel for indigent defendants.

13-11-9. Effective date.

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all

cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed: felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of

unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life

imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

* * * * * *

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-12208-P

BILLY JOE MAGWOOD,

Petitioner-Appellee,
Cross-Appellant,

versus

GRANT CULLIVER, Warden
RICHARD F. ALLEN, Commissioner
Alabama Department of Corrections,
TROY KING, Attorney General of Alabama,

Respondent-Appellee,
Cross-Appellant.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Mar 24 2009
THOMAS K. KAHN
CLERK

- -

On Appeal from the United States District Court
for the Middle District of Alabama

- -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE

APPENDIX D

STATE OF ALABAMA, Plaintiff	IN THE CIRCUIT COURT OF COFFEE COUNTY, ALABAMA
vs.	ELBA DIVISION
BILLY JOE MAGWOOD, Defendant	CASE NO. CC 79-7

On June 2, 1981, Billy Joe Magwood was adjudged guilty of the capital offense of the aggravated murder of Coffee County Sheriff Neil Grantham. Section 13-11-2(a)(5), Code 1975. The jury fixed the punishment at death. A sentence hearing was held on June 9, 1981. The sentence of death was imposed upon Magwood by the Court on June 30, 1981.

The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction and sentence. The United States Supreme Court denied certiorari.

The Alabama Supreme Court set the date of execution for July 22, 1983. The Circuit Court of Coffee County denied a writ of error and a stay of execution on July 18, 1983.

Magwood petitioned the United States District Court for the Middle District of Alabama for a writ of habeas corpus on July 20, 1983. A stay of execution was granted by that court on July 20, 1983. The District Court rejected Magwood's challenge to the guilt phase of the circuit court trial. The District Court granted a conditional writ of habeas corpus and

directed the Circuit Court of Coffee County to resentence Magwood in light of two now-established mitigating factors concerning Magwood's diminished mental condition at the time of trial. The United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court.

This Court conducted a new sentencing hearing and offered the parties the opportunity to submit evidence, argument and briefs.

The Court in formulating this present judgment has considered the original record of the trial and sentence. The record of the coram nobis trial and application for a stay of execution was submitted for consideration by agreement of the parties. The present judgment and sentence has been the result of a complete and new assessment of all of the evidence, arguments of counsel, and law as given by the United States Courts and the Alabama Courts.

The Circuit Court of Coffee County concludes beyond any doubt that Magwood committed the charged aggravated murder of Section 13-11-[2](a)(5). The "aggravation" found to exist beyond all doubt is that on March 1, 1979, Magwood unlawfully, intentionally and with malice aforethought killed Coffee County Sheriff Neil Grantham by shooting him three times at close range with a pistol. When Magwood intentionally took the life of Sheriff Grantham, Grantham was on duty and because of official job related acts as the Sheriff of Coffee County, Alabama. The Court does not find the existence of any other aggravating circumstance in Section 13-11-6, other than the "aggravation" or "capital offense"

alleged in the indictment and proven beyond a doubt. The court is required to focus on the particularized nature of the offense. The offense is particularized by the aggravation and will be considered in the sentence.

The matters relating to any mitigating circumstances including those enumerated in Section 13-11-7[], Code 1975, have been considered.

The mitigating circumstances of Section 13-11-7(3), (4), and (5), do not exist and will not be considered in sentencing Magwood.

The jury in the guilt phase of the trial rejected the not guilty by reason of insanity plea. The Circuit Court of Coffee County concludes that Magwood was not legally insane at the time of the murder of Grantham. The mental condition of Magwood was not the sole cause of the murder. The evidence convinces the Court that Magwood knew the difference between right from wrong and had the ability to refrain from the wrong had he desired. Magwood believed he had been confined in the Coffee County Jail by Sheriff Grantham for insufficient reasons and had expressed his revenge to others on several occasions. Notwithstanding, on March 1, 1979, Magwood was under the influence of extreme mental or emotional disturbance the produce of paranoid schizophrenia which he had suffered from for some time. Section 13-11-7(2) does exist as a mitigating circumstance and the fact that Magwood was under the influence of extreme or emotional disturbance will be considered in sentencing Magwood.

The Circuit Court as stated has given the oral testimony and documents a complete and new assessment in view of the finding of the United States Courts. On March 1, 1979, Magwood's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired by paranoid schizophrenia. The mental condition did not render Magwood legally insane. Magwood's conduct as demonstrated by the evidence shows the murder was contrived, calculated and previously designed. Magwood knew what he did was wrong and not right. This is demonstrated by firing shots at the jailer in flight from the body of Grantham. The Section 13-11-7(6) mitigating circumstance does exist. The fact that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired will be considered in formulating the sentence.

The age of Magwood at the time of the murder was twenty-seven. This is a mitigating circumstance under Section 13-11-7(7) and will be weighed in order to determine punishment.

We understand that the law requires the sentencing authority to consider as a mitigating circumstance any aspect of Magwood's life which tends to indicate that he should not be sentenced to death. Magwood has been considered as a uniquely individual human being.

Magwood was a sound person before his service with the United States Army in Viet Nam. He came back the victim of drugs. He attended Enterprise State

Junior College and Troy State University prior to his conviction for possession of a controlled substance and confinement in the Coffee County Jail.

The United States Courts recognized that the Circuit Court of Coffee County could sentence Magwood to death after weighing the mitigating circumstances against the aggravating circumstances with due regard to the standards required by the Eighth and Fourteenth Amendments.

The Court has considered and weighed the aggravating and mitigating circumstances against each other to determine what is the proper punishment. We have not merely added up the number of each circumstance and compared the total to each other. The law contemplates that different circumstances may be given different weights or values in determining sentence. The Court has weighed the aggravating circumstances against all statutory mitigating circumstances and other aspects of Magwood's life. The Court concludes that the single aggravating circumstance of the intentional murder of Sheriff Neil Grantham outweighs all mitigating circumstances.

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT that Billy Joe Magwood is guilty of the offense of aggravated murder of Coffee County Sheriff Neil Grantham and that Billy Joe Magwood is sentenced to death by electrocution. The date of execution is to be set by the Alabama Supreme Court at the appropriate time as provided in Rules of Appellate Procedure 8(d)(1).

DONE AND ORDERED this 2nd day of October, 1986.*

/s/
Riley Green
CIRCUIT JUDGE

* On November 6, 1986, the court entered an order correcting two typographical errors. Both of those corrections are reflected in this reproduction of the October 2, 1986 order.

OPPOSITION BRIEF

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(2)

Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

No. 09-158

In the SUPREME COURT of the UNITED STATES

BILLY JOE MAGWOOD,
Petitioner,
v.
GRANTT CULLIVER,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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October 8, 2009

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW
(Rephrased)

1. Should this Court grant certiorari to review Magwood's splitless and meritless claim that the Eleventh Circuit's construction of what constitutes a "second or successive" habeas petition is erroneous?

2. Should this Court grant certiorari to review Magwood's splitless and meritless claim that his attorney was constitutionally ineffective during the resentencing because he failed to argue to the resentencing court that the retroactive application of *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), to his case was a violation of the due process clause?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the courts below.

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Billy Joe Magwood murdered Coffee County Sheriff Neil Grantham on March 1, 1979. Magwood was convicted and sentenced to death for this murder on June 2, 1981. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's conviction and death sentence. *Magwood v. State*, 426 So. 2d 918 (Ala. Crim. App. 1982), *aff'd*, 426 So. 2d 929 (Ala. 1983). This Court denied Magwood's petition for writ of certiorari. *Magwood v. Alabama*, 462 U.S. 1124 (1983).

Magwood subsequently filed a petition for writ of error coram nobis challenging his conviction and death sentence. This petition was denied and on March 20, 1984, the Alabama Court of Criminal Appeals affirmed the denial of the corum nobis petition. *Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). A motion for out-of-time appeal was denied by the Alabama Supreme Court on June 5, 1984. *Ex parte Magwood*, 453 So. 2d 1349 (Ala. 1984).

Magwood then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On March 26, 1985, the district court upheld Magwood's conviction but conditionally granted the writ as to the sentence, based on the failure of the sentencing court to find two mitigating circumstances. *Magwood v. Smith*, 608 F. Supp. 218 (M.D. Ala. 1985). The Eleventh Circuit Court of Appeals affirmed this decision. *Magwood v. Smith*, 791 F. 2d 1438 (11th Cir. 1986).

A resentencing hearing was conducted on September 17, 1986. The trial court, after

considering the additional mitigating circumstances as ordered by the district court, again sentenced Magwood to death. The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's resentencing. *Magwood v. State*, 548 So. 2d 512 (Ala. Crim. App.), *aff'd*, 548 So. 2d 516 (Ala. 1988). This Court denied Magwood's petition for writ of certioarari. *Magwood v. Alabama*, 483 U.S. 923 (1989).

Magwood filed a second habeas petition challenging his resentencing in the district court on April 23, 1997. On April 9, 2007, the district court granted Magwood's habeas petition on his fair warning claim and ineffective assistance of counsel claim based on the fair warning claim and vacated Magwood's death sentence. On January 23, 2009, the Eleventh Circuit Court of Appeals reversed the district court's holding that Magwood's fair warning claim was successive under 28 U.S.C. §2244(b)(2). The Eleventh Circuit also reversed the district court's holding that Magwood was denied the effective assistance of counsel because his attorney failed to argue to the resentencing court that the retroactive application of *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), to his case was a violation of the due process clause. *Magwood v. Culliver*, 555 F. 3d 968 (11th Cir. 2009). On March 24, 2009, the Eleventh Circuit Court of Appeals denied Magwood's petition for rehearing and his petition for rehearing en banc. See Pet. App. C.

STATEMENT OF JURISDICTION

The statement of jurisdiction contained on page 1 of Magwood's petition for writ of certiorari is correct. Magwood, however, has not articulated any basis for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which is contained on pages 1-2 of Magwood's petition for writ of certiorari, is correct.

STATEMENT OF THE CASE

Billy Joe Magwood has completed two rounds of state and federal habeas litigation. The first concluded in 1986. This petition marks the culmination of the second. During this second round of litigation, Magwood raised a penalty-phase claim that unquestionably could have been, but was not, raised during his first round of litigation 20-plus years earlier. The court of appeals thus held that this claim was barred because it constituted a second or successive petition under 28 U.S.C. §2244(b)(2). Magwood fails to establish (1) that the lower court erred and (2) that good cause exists to review the court's decision.

A. The Proceedings Below

Billy Joe Magwood murdered Coffee County Sheriff Neil Grantham on March 1, 1979. Magwood was convicted and sentenced to death for this murder on June 2, 1981. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's conviction and death sentence. *Magwood v. State*, 426 So. 2d 918 (Ala. Crim. App. 1982), *aff'd*, 426 So. 2d 929 (Ala. 1983). This Court denied Magwood's petition for writ of certiorari. *Magwood v. Alabama*, 462 U.S. 1124 (1983).

On July 13, 1983, Magwood filed a petition for writ of error coram nobis in the Circuit Court of Coffee County. This petition was denied and on March 20, 1984, the Alabama Court of Criminal Appeals affirmed the denial of the coram nobis petition. *Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). A motion for out-of-time appeal was denied by the Alabama Supreme Court on June 5, 1984. *Ex parte Magwood*, 453 So. 2d 1349 (Ala. 1984).

Magwood then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On March 26, 1985, the district court upheld Magwood's conviction but conditionally granted the writ as to the sentence, based on the failure of the sentencing court to find two mitigating circumstances. *Magwood v. Smith*, 608 F. Supp. 218 (M.D. Ala. 1985). The Eleventh Circuit Court of Appeals affirmed this decision. *Magwood v. Smith*, 791 F. 2d 1438 (11th Cir. 1986).

A resentencing hearing was conducted on September 17, 1986. (Doc. 17, Habeas Checklist, Tab

#1) On October 2, 1986, the trial court, after considering the additional mitigating circumstances as ordered by the district court, again sentenced Magwood to death. (Doc. 17, Habeas Checklist, Tab #1) The Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's resentencing. *Magwood v. State*, 548 So. 2d 512 (Ala. Crim. App.), *aff'd*, 548 So. 2d 516 (Ala. 1988). This Court denied Magwood's petition for writ of certiorari. *Magwood v. Alabama*, 483 U.S. 923 (1989).

Magwood filed a second habeas petition challenging his resentencing on April 23, 1997. (Doc. 1) On May 21, 1997, the district court ordered that the case would proceed in two stages. (Doc. 10) The district court referred the Stage I proceedings to the magistrate judge. (Doc. 10) In Stage I, the magistrate judge was to determine which claims should be dismissed on procedural default grounds and which claims required an evidentiary hearing. (Doc. 10)

The State answered the habeas petition on August 12, 1997. (Doc. 16) On May 30, 2000, the State filed its initial Stage I brief. (Doc. 35) Magwood filed his Stage I brief on July 7, 2000. (Doc. 37) The State filed its Stage I reply brief on July 28, 2000. (Doc. 40) On August 2, 2000, the State filed a motion to amend its answer with the amended answer attached. (Doc. 41) Magwood objected to the State's motion to amend. (Doc. 42) The magistrate judge granted the State's motion to amend its answer on September 20, 2000. (Doc. 45)

On February 28, 2003, the magistrate judge entered her recommendation on the Stage I issues.

(Doc. 59) The State filed objections to the magistrate judge's recommendation on March 13, 2003. (Doc. 61) On this same date, the State filed a motion for leave to file a second amended answer, with the second amended answer attached. (Doc. 62) Magwood filed objections to the magistrate judge's recommendation on March 29, 2003. (Doc. 64) The magistrate judge denied the State's motion to file a second amended answer on May 19, 2003. (Doc. 67)

On January 27, 2004, the district court entered an order overruling the State's objections and overruling Magwood's objections, with one exception. (Doc. 69) In this order, the district court ordered the parties to file supplemental briefs on whether Magwood's *Brady* claims were barred by the "law of the case" doctrine. (Doc. 69) The parties filed supplemental briefs on February 10, 2004. (Doc. 71, 72) After a conference call on February 23, 2004, the district court ordered further supplemental briefing on whether Magwood's *Brady* claims originated in his 1986 resentencing and whether 28 U.S.C. §2244(b) limited the district court's consideration of the *Brady* claims. The parties filed their supplemental briefs on this issue on March 23, 2004. (Docs. 78, 79) Magwood filed his brief on the merits of the remaining claims (Stage II brief) on June 8, 2005. (Doc. 94) The State filed its brief on the merits on July 13, 2005. (Doc. 95) Magwood filed his reply brief on July 27, 2005. (Doc. 97)

On February 2, 2007, the district court entered an opinion and order overruling Magwood's objections that the magistrate judge had improperly disallowed his *Brady* claims to proceed to Stage II. (Doc. 112) On April 9, 2007, the district court granted Magwood's habeas petition on his fair warning claim

and ineffective assistance of counsel based on the fair warning claim and vacated Magwood's death sentence. (Doc. 115, pp. 36-82, 98-109) The State filed a notice of appeal and a motion to stay the judgment of the district court on May 8, 2007. (Docs. 117, 118) Magwood filed a notice of cross-appeal and a motion for a certificate of appealability on May 22, 2007. (Docs. 120, 121) On May 25, 2007, the district court granted the State's motion to stay the judgment. (Doc. 124) On June 6, 2007, the district court granted Magwood's motion for a certificate of appealability. (Doc. 128)

B. Statement of the Facts

The Alabama Court of Criminal Appeals summarized the facts presented at Magwood's trial in its May 18, 1982 opinion, as follows:

> Thomas Weeks, a Coffee County Deputy Sheriff, testified he was employed as the county jailer on March 1, 1979, under Coffee County Sheriff Neil Grantham. The witness stated he observed appellant, whom he recognized as a former jail inmate, sitting in a car parked in Sheriff Grantham's parking space at approximately 6:45 a.m. Shortly before 7:00 a.m., he observed Sheriff Grantham drive up and park his vehicle. He got out of the automobile, walked to some garbage cans and deposited a trash bag, and then walked towards the jail door. Appellant got out of his automobile with something in his hand and met Sheriff Grantham at the rear of the car. At that point, Deputy

> Weeks heard three gunshots and saw Sheriff Grantham fall. The witness then turned back into the jail and obtained a gun. He observed appellant get back into his car and saw that he held a pistol in his hand. He exchanged fire with appellant as he drove away. Deputy Weeks then went over to where Sheriff Grantham lay on the ground and observed that the Sheriff's face was blue and that he appeared not to be breathing, having apparently been hit in the face and neck. Deputy Weeks stated he observed no one else in the area at the time the Sheriff was killed.

Magwood v. State, 426 So. 2d 918, 920 (Ala. Crim. App. 1982).

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Magwood does not allege – let alone prove – any traditional ground for certiorari. Magwood does not, for instance, argue that this case presents a novel and important question of federal law, *see*, Sup. Ct. R. 10(c). At bottom, Magwood requests that this Court engage in a fact-bound review of his particular case. This Court should deny his petition for writ of certiorari.

I. This Court Should Decline To Review Magwood's Splitless And Meritless Claim That The Eleventh Circuit's Construction Of What Constitutes A "Second Or Successive" Habeas Petition Holding Warrants Review.

Magwood contends that the Eleventh Circuit erred when it held that his fair warning claim, raised for the first time after his resentencing, was successive and barred from review under 28 U.S.C. §2244(b)(2). Magwood asserts that this holding is contrary to this Court's and other circuits recognition that habeas petitions brought against new sentences are first petitions.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of Certiorari Review.

Magwood's claim is simply a request for this Court to review the determination of the Eleventh Circuit that his fair-warning claim was successive and barred from review under 28 U.S.C. §2254(b)(2). While Magwood alleges there is a split in the circuits regarding this claim, this is untrue. In addition, Magwood does not assert that this case presents a novel and important question of federal law. Instead, Magwood is asking this Court for nothing more than a review of the determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Because Magwood has failed to articulate a "compelling reason" under Rule 10 for this Court to

grant certiorari to review this claim, this Court should deny the writ.

B. The Holding Of The Eleventh Circuit That Magwood's Fair Warning Claim Is Successive Under 28 U.S.C. §2244(b) Is Correct.

Magwood filed his first habeas petition over 25 years ago. The district court denied the petition as to Magwood's sentence but granted the petition as to the death sentence. *Magwood v. Smith*, 608 F. Supp. 2d 218 (M.D. Ala. 1985). Magwood did not raise his fair warning claim even though he could have done so. (Doc. 15, p. 68) Magwood also filed an application for leave to file a successive petition for writ of habeas corpus pursuant to 28 U.S.C. §2244 with the Eleventh Circuit Court of Appeals on April 23, 1997. *In re: Magwood*, 113 F. 3d 1544 (11th Cir. 1997). Magwood simultaneously filed the habeas petition from his resentencing in the district court. However, Magwood did not ask the Eleventh Circuit for permission to file a successive petition concerning his fair warning claim – a claim that was available to Magwood when he filed his first habeas petition.

The district court found, based on the Eleventh Circuit's opinion in *Ex parte Green*, 215 F. 3d 1195 (11th Cir. 2000), that Magwood's fair warning claim was not successive within the meaning of the AEDPA. *Magwood v. Culliver*, 481 F. Supp. 2d 1262, 1274-1287 (M.D. Ala. 2007). The Eleventh Circuit reversed this holding by the district court relying on the Second Circuit's analysis in *Galteiri v. United States*, 128 F. 3d 33, 37-38 (2nd Cir. 1997). *Magwood v. Culliver*, 555 F. 3d 968, at 975-976 (11th Cir. 2009). Applying the Second Circuit's approach to

Magwood's case, the Eleventh Circuit found as follows:

> [T]hose claims seeking to challenge the new, amended component of the sentence are regarded as part of a first petition, and those claims seeking to challenge any component of the original sentence that was not amended are regarded as part of a second petition. Here, the fair-warning claim was available at Magwood's original sentencing. On resentencing, the exact same aggravator-the one alleged in the indictment as allowed by -was used again. As Magwood's fair-warning claim was available at his original sentencing, Magwood's claim is successive and is governed by 28 U.S.C. § 2244(b)(2). This claim is due to be dismissed because it is successive, and Magwood does not assert it fits into one of § 2244(b)(2)'s exceptions. Thus, we reverse the district court's grant of relief on this claim, and dismiss Magwood's fair-warning claim as successive. (footnote omitted).

Magwood v. Culliver, 555 F. 3d at 975-976.

The Eleventh Circuit properly found that Magwood's attempt to raise this claim in his second habeas petition was precluded under 28 U.S.C. §2244(b)(2). The Eleventh Circuit correctly concluded that claims that could have been raised for the first time must be raised at the first opportunity and that claims that arise solely from a new judgment or new sentencing hearing – that could not

have been raised the first time around – can be raised in a second habeas petition. As the Eleventh Circuit, *quoting Galtieri,* 128 F. 3d at 37, explained:

> That approach ... would permit every defendant who succeeds in having any component of his sentence modified to bring a renewed challenge ... to the unamended components of his original sentence, raising grounds that were either available for presentation on the first petition or even specifically rejected on that petition. Congress, in enacting sections [2255 and 2254] to sharply restrict repetitive habeas petitions, could not have wanted such an indulgent result.

Id. at 37. The Second Circuit then concluded:

> [W]henever a first 2255 petition succeeds in having a sentence amended, a subsequent 2255 petition will be regarded as a "first" petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a "second" petition to the extent that it challenges ... any component of the original sentence that was not amended.

Id. at 37-38.

None of this Court's cases cited by Magwood require a different conclusion. This Court did not hold, as Magwood asserts, that it deems applications successive only when they "contest the same

judgment of a state court." *Burton v. Stewart*, 549 U.S. 147, 153 (2007). In fact, this Court noted the following in *Burton*:

> There is no basis in our cases for supposing, as the Ninth Circuit did, that a petitioner with unexhausted claims who chooses the second of these options-who elects to proceed to adjudication of his exhausted claims-may later assert that a subsequent petition is not "second or successive" precisely because his new claims were unexhausted at the time he filed his first petition. This reasoning conflicts with both *Lundy* and § 2244(b) and would allow prisoners to file separate habeas petitions in the not uncommon situation where a conviction is upheld but a sentence is reversed. Such a result would be inconsistent with both the exhaustion requirement, with its purpose of reducing "piecemeal litigation," *Duncan v. Walker*, 533 U.S. 167, 180, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), and AEDPA, with its goal of "streamlining federal habeas proceedings," *Rhines v. Weber*, 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

The holding of the Eleventh Circuit in Magwood's case reduces piecemeal litigation and is also consistent with the AEDPA's goal of "streamlining federal habeas proceedings." *Burton, supra*. The holding of the Eleventh Circuit also furthers the purpose of the AEDPA because it "furthers the

principles of comity, finality, and federalism." *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007)(noting that the purpose of the AEDPA is to "further the principles of comity, finality, and federalism.").

Neither does this Court's opinion in *Richmond v. Lewis*, 506 U.S. 40 (1992), reinforce the conclusion that an initial habeas petition challenging a new judgment is by definition a first petition, as Magwood argues. Pet. 13-14. In fact, the issue before this Court in *Richmond* was "whether the Supreme Court of Arizona ha[d] cured petitioner's death sentence of vagueness error." *Richmond*, at 531. There is no discussion by this Court, in this pre-AEDPA case, of the successive petition rule nor does it appear that this was an issue before this Court. Magwood's argument that this Court's holding in *Richmond* reinforces the conclusion that an initial habeas petition challenging a new judgment is by definition a first petition is without merit.

The Eleventh Circuit properly dismissed Magwood's fair-warning claim because it was successive under 28 U.S.C. §2244(b) (2). This Court should, therefore, refuse to grant certiorari on this issue.

C. The Holding Of The Eleventh Circuit Does Not Create A Circuit Split.

Magwood contends this Court should grant certiorari review of his claim because two federal circuits have explicitly rejected the rule that the Eleventh Circuit adopted here. Magwood asserts that the second circuit and the ninth circuit have reached decisions that are contrary to the decision reached by the Eleventh Circuit in his case.

This Court should not grant certiorari to review the alleged split in the circuits for two reasons. First, there is no split between the holdings of the Second Circuit and the Eleventh Circuit. The Second Circuit followed it holding in *Galteiri v. United States*, 128 F.3d 33 (2nd Cir. 1997), in *Esposito v. United States*, 135 F.3d 111, 113-114 (2nd Cir. 1997). The Second Circuit stated the following in *Esposito*:

> Not every habeas petition that attacks a new and amended judgment is saved from the AEDPA's bar on "second or successive" petitions. We recently decided in *Galtieri v. United States*, 128 F.3d 33 (2d Cir.1997), that
>
> whenever a first 2255 petition succeeds in having a sentence amended, a subsequent 2255 petition will be regarded as a "first" petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a "second" petition to the extent that it challenges the underlying conviction or seeks to vacate any component of the original sentence that was not amended.
>
> *Id.* at 37-38. Galtieri's section 2255 petition was a "second" petition even though Galtieri's first section 2255 petition succeeded in amending the supervised release component of his original sentence, because the later petition raised no challenge to the new supervised release term and concerned instead the conviction and the

> components of his sentence that were not amended. *Id.*
>
> Procedurally, the present case is the obverse of *Galtieri,* because Esposito's current section 2255 petition seeks to vacate his new sentence on grounds opened by the resentencing. Under *Galtieri,* therefore, Esposito's pending section 2255 petition is not a "second or successive" petition for purposes of the gatekeeping requirements of the AEDPA. Therefore, no authorization by this Court is required. We transfer the petition back to the district court for further proceedings.

The holding of the Eleventh Circuit in Magwood's case is consistent with the holding of the Second Circuit in *Galtieri* and *Esposito.* In *Magwood,* the Eleventh Circuit correctly determined that his fair-warning claim was a claim that was available when Magwood filed his first habeas petition and was not a ground opened by the resentencing. There is, therefore, no split in the decision of the Eleventh Circuit in *Magwood* and the decisions of the Second Circuit in *Galtieri* and *Esposito.*

Second, this Court should not grant Magwood's certiorari petition because there is no significant split in the circuits concerning this matter. Magwood relies on one[1] pre-AEDPA Ninth Circuit case to argue that there is a split in the circuits.

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[1] As set forth in the paragraph above, there is no split between he holdings of the Second Circuit and the Eleventh Circuit concerning this issue.

This is not such a split as to warrant review under Rule 10 of the Supreme Court Rules. Moreover, Magwood fails to cite any post-AEDPA cases that follow the Ninth Circuit's holding in *Richmond v. Lewis*, 948 F. 2d 1473 (9th Cir. 1992). This case does not present, at this time, sufficient special and important reasons to grant certiorari review. *See Faye v. Noia*, 372 U.S. 391, 436 (1963); Rule 10, Rules of the Supreme Court of the United States.[2]

D. The Holding Of The Eleventh Circuit Does Not Have Pernicious Consequences For The General Administration Of Habeas Corpus, As Magwood Argues.

Magwood contends that the Eleventh Circuit's holding in his case will have pernicious consequences for the general administration of habeas corpus. Pet. 17-20. This Court should not grant certiorari review based on this argument for several reasons. First, it is not true that the Eleventh Circuit's holding would require all claims against new judgments to be dismissed under §2244(b)(2). Nor would the holding of the Eleventh Circuit prevent habeas petitioner's from challenging the same violations that triggered habeas relief in the first place immune from challenge after retrial or resentencing or prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court. Instead, the holding of the Eleventh Circuit is limited to those situations where the claim was available at the original trial or sentencing but was not raised at that time. In that situation, and

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[2] This is especially true where there are other compelling reasons, as set out in part I-E of the State's brief in opposition, why certiorari review is not appropriate in this case.

that situation only, the Eleventh Circuit held that the claim would be successive under 28 U.S.C. §2244.

In fact, Magwood's position would have more pernicious consequences than the holding of the Eleventh Circuit. Magwood's position would allow petitioners to sleep on their claims until the second or third round of appeals thus allowing petitioner's, like Magwood, to file new attacks on their convictions and sentences 20 to 30 years after their original trials. Magwood's position would also allow petitioner's to raise the same claims over and over again after resentencing because they would argue that they are attacking new sentences each time. Magwood's position is completely contrary to the purposes of the AEDPA to further "the principles of comity, finality, and federalism." *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007). As this Court stated in *Panetti*, *quoting Day v. McDonough*, 547 U.S. 198, 205-206 (2006): "The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Panetti*, 551 U.S. at 945. The same can be said of the successive petition rule of the AEDPA. Magwood's position that a petitioner can raise any new claim after a retrial or resentencing has more pernicious consequences than the holding of the Eleventh Circuit and should not be allowed by this Court.

E. There Are Other Compelling Reasons Why Certiorari Should Not Be Granted In This Case.

There are two other reasons why this Court should not grant Magwood's petition for writ of certiorari. First, not only is this case successive under 28 U.S.C. §2444, it is also procedurally defaulted. Second, the fair-warning claim is without merit.

1. This claim is procedurally defaulted.

This claim was not raised at resentencing, on appeal from the resentencing, and was not fairly raised in the state post-conviction proceedings from the resentencing. Magwood's failure to raise this claim was a procedural default under state law which barred consideration of this claim by the district court. *See Teague v. Lane*, 489 U.S. 288, 297-298 (1989)(claims not raised at all in state court are procedurally barred).

Magwood argued in the district court that this claim was presented in the state post-conviction proceedings. However, a review of the Rule 20 petition and Magwood's brief on appeal in the Alabama Court of Criminal Appeals reveals that this claim was not fairly presented to the state courts. (Doc. 17, Habeas Checklist, Tab #21, paragraphs 33, 39, 41-43; Tab #25, pp. 23-29) Magwood never alleged in his Rule 20 petition (or at resentencing or on appeal from the resentencing) that sentencing him to death was a retroactive application of the holding in *Kyzer*. While Magwood does have a phrase in a one-sentence statement in his 94-page brief from the denial of the Rule 20 petition concerning the holding in *Kyzer*, this does not

substantially raise this as a ground for relief to be considered by the Alabama appellate courts. (Doc. 17, Habeas Checklist, Tab #25, pp. 23-29) *Kelley v. Sec. for the Dept. of Corr.*, 377 F. 3d 1317, 1345 (11th Cir. 2004); *Jones v. Campbell*, 436 F. 3d 1285, 1313-1305 (11th Cir. 2006). In fact, all Magwood states, after arguing for 6 pages that the murder of a law enforcement officer is not generally punished by death nor was punished capitally at the time his sentences of death were affirmed in 1982 and 1988, is the following: "Further, the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered Mr. Magwood's sentence unconstitutional under the 5th, 8th, and 14th Amendments." (Doc. 17, Habeas Checklist, Tab #25, p. 29)(emphasis added).

In addition, contrary to Magwood's argument in the district court, the Alabama Court of Criminal Appeals did not reach the merits of this claim. There is no discussion by the Alabama Court of Criminal Appeals concerning the retroactive application of the judicial rule in *Kyzer* to Magwood's case. There is no discussion because, as set forth above, this claim was not fairly presented to the state courts. A review of the decision of the Alabama Court of Criminal Appeals reveals that it was discussing Magwood's contention that the trial court considered an improper aggravating circumstance and disregarded mitigating evidence. *Magwood v. State*, 689 So. 2d 959, 965-66 (Ala. Crim. App. 1996). While the Alabama Court of Criminal Appeals, relying on *Kyzer*, finds that the trial court properly relied on the aggravating circumstance alleged in the indictment, there is absolutely no discussion by the Alabama

Court of Criminal Appeals concerning the retroactive application of *Kyzer* to Magwood's case. This claim was not considered by the Alabama courts and is, therefore, procedurally defaulted.

This claim was not presented face-up and squarely to the state courts. *See Picard v. Connor*, 404 U.S. 270, 275 (1971)(federal claim must be fairly presented to the state courts). Certiorari should, therefore, be denied because this claim is procedurally defaulted.

2. Magwood's fair-warning claim is without merit.

Magwood is also not entitled to relief on this claim because his fair-warning claim is without merit. Magwood was given fair notice that he could be sentenced to death for the murder of Sheriff Grantham. Ala. Code, §13-11-2 (a) provided, in pertinent part, as follows: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment..." It is, therefore, clear from the face of §13-11-2 that the murder of a police officer was a capital offense for which the death penalty could be imposed.

In addition, while Sheriff Grantham's murder itself occurred before the Alabama Supreme Court's holding in *Kyzer*, Magwood's trial (June 2, 1981) and his resentencing (October 2, 1986) occurred after the Alabama Supreme Court issued its March 6, 1981 opinion in *Kyzer*. Thus, Magwood was given fair warning that he could be sentenced to death for the murder of Sheriff Grantham. *See Rose v. Locke*, 423 U.S. 48, 49, (1975) (the fair-warning requirement of

the due process clause "prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed,'" *quoting United States v. Harris*, 347 U.S. 612, 617, (1954)); *Rogers v. Tennessee,* 532 U.S. 451, 459, (2001) (the rationale in *Bouie* rested on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.[3]"); *Marks v. United States*, 430 U.S. 188, 191-192, (1977) (due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *United States v. Lanier*, 520 U.S. 259, 267, (1997) ("the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."); *McBoyle v. United States*, 283 U.S. 25, 27, (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). Magwood was given "fair warning" that he could be sentenced to death for the murder of Sheriff Grantham, therefore, his due process rights were not violated.

In addition, this claim is without merit because the Alabama Supreme Court's interpretation of the 1975 capital murder statute was not an

---

[3] At no time was Magwood's conduct innocent in the instant case.

unforeseeable construction of that statute. Nor was the Alabama Supreme Court's interpretation of that statute unexpected or indefensible. In *Rogers v. Tennessee*, 532 U.S. 451 (2001) – a case that the district court erroneously refuses to follow – this Court examined the constitutionality of the retroactive application of a judicial decision by the Supreme Court of Tennessee abolishing the common law "year and a day rule." *Id.*, 523 U.S. at 453. In addressing this claim, this Court looked to its holding in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and stated:

> In *Bouie v. City of Columbia*, we considered the South Carolina Supreme Court's retroactive application of its construction of the State's criminal trespass statute to the petitioners in that case. The statute prohibited "entry upon the lands of another ... after notice from the owner or tenant prohibiting such entry ...." 378 U.S., at 349, n. 1, 84 S.Ct. 1697 (citation and internal quotation marks omitted). The South Carolina court construed the statute to extend to patrons of a drug store who had received no notice prohibiting their entry into the store, but had refused to leave the store when asked. Prior to the court's decision, South Carolina cases construing the statute had uniformly held that conviction under the statute required proof of notice before entry. None of those cases, moreover, had given the "slightest indication that that requirement could be satisfied by proof

of the different act of remaining on the land after being told to leave." *Id.*, at 357, 84 S.Ct. 1697.

We held that the South Carolina court's retroactive application of its construction to the store patrons violated due process. Reviewing decisions in which we had held criminal statutes "void for vagueness" under the Due Process Clause, we noted that this Court has often recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Id.*, at 350, 84 S.Ct. 1697; see *id.*, at 350-352, 84 S.Ct. 1697 (discussing, *inter alia*, *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), and *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Bouie v. City of Columbia*, 378 U.S., at 352, 84 S.Ct. 1697. For that reason, we concluded that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'

> [the construction] must not be given retroactive effect." *Id.*, at 354, 84 S.Ct. 1697 (quoting J. Hall, General Principles of Criminal Law 61 (2d ed.1960)). We found that the South Carolina court's construction of the statute violated this principle because it was so clearly at odds with the statute's plain language and had no support in prior South Carolina decisions. 378 U.S., at 356, 84 S.Ct. 1697.

Rogers, 532 U.S. at 456-458.

This Court then found that the Tennessee court's abolition of the year and a day rule was not unexpected and indefensible because

> [t]here is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

Rogers, 532 U.S. at 466-467.

The same is true of §13-11-2. That provision clearly set out that the murder of a police officer while on duty or because of some official or job-related act or performance was a capital offense which could be punished by death. Section 13-11-2 (a) provided, in pertinent part, as follows: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment...." It is, therefore, clear from the face of §13-11-2 that the murder of a police officer was a capital offense for which the death penalty could be imposed.

This is exactly what the Alabama Supreme Court found in *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). The Alabama Supreme Court's finding that the aggravation averred in the indictment was all the aggravation needed to impose the death penalty is not unexpected or indefensible. Instead, it is completely foreseeable since the §13-11-2 (5) capital offense did not have a corresponding aggravating circumstance but was clearly a capital offense where death could be imposed. The Alabama Supreme Court noted in *Kyzer* that an anomaly existed in the 1975 capital murder statute because it set forth fourteen offenses for which the death penalty could be imposed but failed to provide a corresponding aggravating circumstance for all fourteen offenses. *Kyzer*, 399 So. 2d at 334. After examining the history of the 1975 capital murder statute, the Alabama Supreme Court stated:

> What if the trial judge cannot find the existence of an aggravating circumstance other than the

"aggravation" averred in the indictment? Must the trial judge "refuse to accept the death penalty as fixed by the jury?" A literal and technical reading of the statute would answer this inquiry in the affirmative, but to so hold would be completely illogical and would mean the legislature did a completely useless act by creating a capital offense for which the defendant could not ultimately receive the death penalty. Why would the legislature require that "aggravation" be averred in the indictment and authorize the jury to fix the punishment at death, and then not provide a corresponding "aggravating circumstance" for the judge to find, and thereby force the judge at the post conviction hearing to refuse to accept the death penalty fixed by the jury? We can think of no reason why the legislature would intend such a result.

***

If, on review, the trial judge could not "weigh the aggravating ... circumstance" which was averred in the indictment, and which was a part of the substantive offense, but which aggravating circumstance was not included in §13-11-6, the sentencing hearing would be a complete and useless endeavor. We cannot assume that the legislature did a useless act. It is apparent that the legislature intended to permit the trial

> judge to find the same "aggravated circumstances enumerated in §13-11-2." Code 1975, §13-11-1. We so hold.

Id., at 337-338.

After applying traditional rules of statutory construction, the Alabama Supreme Court found that the legislature intended to punish capitally defendants found guilty of offenses listed in §13-11-2 and stated: "If a defendant is convicted of a capital offense, and the trial judge is authorized to find the same 'aggravation' which was averred in the indictment and which was proved beyond a reasonable doubt before a jury, there can be no violation of any of defendant's rights." *Id.*, at 338-339. The Alabama Supreme Court's construction of the 1975 capital murder statute was not an unforeseeable construction of that statute.

Magwood was given fair warning that he could be sentenced to death for the murder of Sheriff Grantham. In addition, the Alabama Supreme Court's holding in *Kyzer* was not an unforeseeable construction of the Alabama capital murder statute. Certiorari should also be denied because this claim is without merit.

II. This Court Should Decline To Review Magwood's Splitless And Meritless Claim That His Attorney Was Constitutionally Ineffective During The Resentencing Because He Failed To Argue To the Resentencing Court That The Retroactive Application Of *Kyzer* To His Case Was A Violation Of The Due Process Clause.

Magwood contends that the Eleventh Circuit's rejection of his claim that his resentencing counsel was ineffective because he failed to argue to the resentencing court that the retroactive application of *Kyzer* to his case was a violation of due process warrants review by this Court. Certiorari should be denied as to this claim for at least two reasons.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of Certiorari Review.

Magwood's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Magwood does not assert that there is a split in the circuits regarding his ineffective assistance of counsel claim or that this case presents a novel and important question of federal law. Instead, Magwood is asking this Court for nothing more that a review of the factual determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Because Magwood has failed to articulate a "compelling reason" under Rule 10 for this Court to

grant certiorari to review this claim, this Court should deny the writ.

B. Certiorari Should Be Denied Because This Claim Is Without Merit.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), there are two components of an ineffective assistance of counsel claim. A defendant must prove deficient performance and that he was prejudiced by this deficient performance. The burden is on the habeas petitioner to establish both of these components. *Atkins v. Singletary*, 965 F. 2d 952, 958 (11th Cir. 1992). As the Eleventh Circuit stated: "[W]hether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny." *Waters v. Thomas*, 46 F. 3d 1506, 1511 (11th Cir. 1995).

To prove the first component a defendant must establish that counsel's performance was constitutionally deficient, which means it was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In making that determination, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* In addition, the court held that an attorney's strategic choices, made after reasonable investigation, are virtually beyond challenge and that whether an attorney's strategic choices were reasonable may be determined, or substantially influenced, by what he was told by the defendant.

Id. 466 U.S. at 690-91. Given the deference that counsel's performance is due, the cases in which the writ is granted are "few and far between." *Chandler v. United States*, 218 F. 3d 1305, 1313 (11th Cir. 2000) (en banc). The Eleventh Circuit also stated the following in *Grayson v. Thompson*, 257 F. 3d 1194, 1216 (11th Cir. 2001):

> Thus, in order to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take.* (emphasis in original)

"The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is ... whether what they did was within the 'wide range of professional assistance.'" *Id.* at 1313 n.12, *quoting Waters*, 46 F. 3d at 1518.

A defendant must also establish the prejudice requirement, which requires that he prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The appropriate analysis of the prejudice prong of *Strickland* requires an evaluation of 'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Bottoson v. Moore*, 234 F. 3d 526, 534 (11th Cir. 2000), *quoting Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). To establish prejudice sufficient to sustain a claim of ineffective

assistance of counsel at sentencing, "[i]t is not enough for the defendant to show that the error had some conceivable effect on the outcome of the proceeding." *Tompkins v. Moore*, 193 F. 3d 1327, 1336 (11th Cir. 1999). Instead, *Strickland* makes it clear that "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

The Eleventh Circuit properly determined that counsel's performance was not deficient for failing to argue to the resentencing court that the retroactive application of *Kyzer* to his case was a violation of due process. The Eleventh Circuit found as follows concerning this claim: "We are not prepared to require counsel to raise an argument that has already been decided adversely to his client's position by a state's highest court in order to avoid being found ineffective." *Magwood*, 555 F. 3d at 978. Counsel, in fact, correctly informed the resentencing court that it could resentence Magwood to death without finding an aggravating circumstance in former 1975 Ala. Code §13-11-6. This statement by counsel was, in fact, a correct statement of the law under the Alabama Supreme Court's holding in *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). In fact, this was the same aggravation found by the trial court when it originally sentenced Magwood to death. *Magwood v. State*, 462 So. 2d 918, 920, 928 (Ala. Crim. App. 1982). Counsel had every reason to believe that the Alabama Supreme Court meant what it said about state law – and that federal courts

would respect the state court's decision on a purely state law question. The Eleventh Circuit, therefore, properly determined that counsel's performance was not deficient because he accurately informed the trial court of the law.

In addition, Magwood was not prejudiced by counsel's performance at his resentencing. In order to prove prejudice, this Court made it clear in *Strickland* that "the question of whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent, it reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. There is no evidence in the instant case that had resentencing counsel made an objection based on a due process claim that the sentencer in this case, including the Alabama appellate courts, would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. This is especially true where, as set forth above, there was no due process violation because Magwood was given fair notice that he could be sentenced to death for the murder of Sheriff Grantham. In addition, the Alabama Supreme Court's interpretation of the 1975 capital murder statute was not an unexpected, indefensible or unforeseeable construction of §13-11-2. There is, therefore, not a reasonable probability that if counsel had challenged the death sentence based on Magwood's current due process challenge that the resentencing court would not have resentenced him to death. This Court should, therefore, deny the writ.

CONCLUSION

For the foregoing reasons, this Court should deny Magwood's petition for writ of certiorari.

Respectfully submitted,

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REPLY BRIEF

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BILLY JOE MAGWOOD,

Petitioner,

v.

GRANTT CULLIVER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

For nearly three decades, the State has been seeking to execute petitioner for an act that the district court held, and the Eleventh Circuit did not dispute, was not a capital offense under state law when he committed it. Having persuaded the Alabama courts to allow such punishment, the State now characterizes the Eleventh Circuit's denial of habeas relief as a factbound decision raising no certworthy issues. Notwithstanding these boilerplate protestations and the State's attempts to justify the Eleventh Circuit's decision on alternative grounds, the Eleventh Circuit's decision rests on pure, outcome-determinative legal holdings that cry out for review by this Court.

The Eleventh Circuit's successive petition holding contravenes basic *res judicata* principles as well as this Court's precedent; creates a circuit split; and threatens to dramatically alter how courts must administer 28 U.S.C. § 2244(b) following retrials and resentencings. The Eleventh Circuit's ineffective assistance holding ignores the distinction between state and federal law – that is, between the Alabama Supreme Court's dispensing with Alabama's aggravating circumstance requirement for death-eligibility, and counsel's failure to argue that the Due Process Clause prohibited applying that decision retroactively. (Indeed, the Eleventh Circuit's analysis on this deficient-performance point is so demonstrably incorrect that, if this were the only issue in the case, summary reversal would be appropriate.) Certiorari should be granted.

I. This Court Should Review The Eleventh Circuit's Successive Petition Holding.

1. Drawing on basic *res judicata* principles, the petition explained what should be self-evident: a habeas petition challenging a new judgment cannot be deemed a successive petition. It does not matter whether a retrial or a resentencing results in a judgment that is substantively identical to a previous one. When a judgment is vacated and a new judgment is entered in its place, a petition challenging that new judgment is necessarily a first petition – and any claim in such a petition should be treated as one in a first petition. Pet. 11.[1]

Instead of engaging the logic of this argument, the State simply disputes that *Richmond v. Lewis*, 506 U.S. 40 (1992), and *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam), support it. The State misreads these decisions.

As the State implicitly acknowledges, this Court in *Richmond* ruled for a state prisoner on the merits of a claim in exactly the same procedural posture as this one. It is true, as the State points out, that "[t]here was no discussion by this Court" of whether the prisoner's claim was successive. BIO 14. But the issue had been litigated below and this Court had the authority *sua sponte* to dismiss the claim if it was

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[1] This reasoning does not imply, as the State suggests, that prisoners who are resentenced may "raise the same claims over and over again after resentencing." BIO 18. Ordinary collateral estoppel and *stare decisis* principles preclude prisoners from relitigating arguments already decided adversely against them simply because new judgments have been entered.

successive. *See* Pet. 14. Under these circumstances, this Court's decision to grant review and to reach the merits indicates that it regarded the claim as part of a first petition. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper.") (citations removed).

This Court in *Burton* likewise signaled, for reasons the State does not contest, that a first habeas petition challenging a new sentence can never be successive. *See* Pet. 13. To be sure, *Burton* also emphasized the importance of "reduc[ing] piecemeal litigation." BIO 13. But, as *Burton* indicates, that goal has purchase only when a subsequent petition challenges the "same" judgment. 549 U.S. at 156. When a retrial or resentencing results in a new judgment, the prisoner unquestionably may initiate a new round of habeas review. (Indeed, the State does not challenge petitioner's ability to pursue his ineffective assistance claim here.) Having an additional claim in such a new petition does not create piecemeal litigation.

Nor does the ability to challenge a new sentence, if and when one is entered, encourage prisoners to "sleep on their claims" (BIO 18) when challenging death sentences. Prisoners cannot challenge *resentencings* unless they first succeed in obtaining habeas relief from their existing sentences. They thus have every reason to raise every possible claim against initial sentences.

2. The Eleventh Circuit's successive petition reasoning is so at odds with hornbook law, *see* Pet. 11, that few wardens have asked federal courts to adopt it. (Indeed, even the State did not advance the argument in the district court in this case. *See* Pet. App. 63a.) But when wardens floated this notion in the Ninth and Second Circuits, those courts easily rejected it.[2] Although the State tries to minimize the tension between the Eleventh Circuit's holding and the law of those circuits, its efforts are unpersuasive.

The State does not dispute that the Ninth Circuit in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985), and *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1992), held that a claim in exactly the same posture as petitioner's was not successive. Instead, the State contends that these holdings do not conflict with the Eleventh Circuit's because they predate AEDPA. But as petitioner has pointed out, and as the State does not dispute, nothing in AEDPA altered what constitutes a "successive" petition; AEDPA simply codified the pre-existing concept. Pet. 15 n.6; *see also Watson v. Carey*, 2008 WL 3980340 (E.D. Ca. 2008), *adopting magistrate's recommendation* at 2006 WL 3313834, at *2 (E.D. Ca. 2006) (applying *Richmond* in post-AEDPA case). Consequently, the law of the two circuits is squarely divided.

The State also acknowledges that the Second Circuit has held that a petition challenging a "new

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[2] For another rejection of this argument, see *Moore v. Kinney*, 119 F. Supp. 2d 1022, 1040 (D. Neb. 2000), *aff'd*, 320 F.3d 767 (8th Cir. 2003) (en banc). The state apparently abandoned the argument on appeal.

sentence on grounds opened by the resentencing" is always a first petition. BIO 16 (quoting *Esposito v. United States*, 135 F.3d 111, 113-14 (2d Cir. 1997)). The State asserts, however, that the due process claim petitioner advances "was not a ground opened by [his] resentencing." BIO 16. The State misapprehends the Second Circuit's rule. If a prisoner's sentence is vacated and he receives an entirely "new sentence in [a] new judgment" (as opposed to merely an amended judgment), any claim concerning the legality of the new sentence is "opened by the resentencing." *Esposito*, 135 F.3d at 113-14; Pet. 15-16. Petitioner challenges the legality of his new sentence, so the Second Circuit would have reached the merits of his claim.

3. This issue is important. It is not uncommon for federal courts to grant habeas relief that triggers retrials or resentencings. The Eleventh Circuit's holding indicates, however, that the simple, straightforward rule previously thought to govern habeas petitions challenging such new judgments – namely, that such petitions always constitute first petitions – no longer controls.

The State downplays the threat that this decision poses for the general administration of habeas corpus, asserting that the Eleventh Circuit's holding "is limited to those situations where the claim was available at the original trial or sentencing but was not raised at that time." BIO 17. As the petition points out, however, and as the State does not dispute, 28 U.S.C. § 2244 does not provide any way to so limit the holding. Pet. 17-20. The text of that statute requires courts to decide whether "application[s]" – not claims – are successive. Taking

Eleventh Circuit's approach seriously, therefore, would require courts to treat *all* claims against subsequent judgments as successive, contravening numerous practices that courts, habeas practitioners, and prisoners (most of which must proceed pro se) currently take for granted. *See* Pet. 18-20.[3]

When the only way to mitigate the damage of a holding will be to flout the plain language of the governing statute, this Court should immediately intervene. This is especially so when, as here, the field at issue is already fraught with high-stakes procedural complexity, thus demanding as much clear notice and legal coherence as possible.

4. Finally, the State urges this Court to condone the Eleventh Circuit's successive petition holding based on two arguments that the district court rejected and that the Eleventh Circuit did not address. Neither provides an impediment to review.

a. The district court correctly held that petitioner did not procedurally default his fair warning claim. A habeas petitioner avoids procedural default whenever he properly "present[s] the substance of his

---

[3] Contrary to the State's assertion, for instance, the Eleventh Circuit's decision *would* "prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court." BIO 17. Courts "routinely treat[]" applications as second or successive when they raise "claims alleged to be 'new' due to the Supreme Court's changing the law." *Sustache-Rivera v. United States*, 221 F.3d 8, 14 (1st Cir. 2000). The only reason, therefore, that prisoners in petitioner's position are currently able to seek habeas relief based on intervening decisions is that they have received new judgments.

claim to the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986). The State does not contest that the Rule 20 litigation following petitioner's resentencing was a proper time for him to raise his fair warning claim. Petitioner argued in his Rule 20 filing, *see* Pet. App. 69a, and on appeal that "the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered [his] sentence unconstitutional under the . . . 14th Amendment[]." BIO 20; Pet. App. 69a (quoting petitioner's appellate brief). These easily understandable contentions, punctuated with specific references to the federal constitutional provision involved, more than adequately presented the substance of the claim. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.3c, at 1077-87 (5th ed. 2005).

Even if, as the State suggests, the Alabama Court of Criminal Appeals' denial of relief in *Magwood v. State*, 689 So.2d 959, 965-66 (Ala. Crim. App. 1996), "did not reach the merits" of petitioner's fair warning argument, BIO 20, it would not matter. This Court has termed it "too obvious to merit extended discussion" that a prisoner's ability to renew a federal claim in federal habeas proceedings "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam); *accord Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam). In other words,

when, as here, a prisoner properly presents a federal constitutional claim in state courts, the claim is preserved for federal habeas review, even if the courts choose to ignore it. *Id.*

At any rate, the State's procedural default argument is purely academic. Federal courts may not penalize a prisoner for failing to raise an argument in state court when the argument demonstrates that the prisoner is "innocent of [a] capital crime itself" because "there was no aggravating circumstance." *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). Therefore, as the district court made clear and as the State does not dispute, "Magwood's innocence of the death penalty would . . . excuse, under [*Sawyer*'s] miscarriage-of-justice exception, any procedural default that would otherwise bar his claim." Pet. App. 57a n.7.

b. The district court correctly decided the merits of petitioner's fair warning claim. Pet. App. 44a-60a. When petitioner committed his crime, Ala. Code § 13-11-4 provided that a trial court could not sentence a defendant to death without finding "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6." Pet. App. 97a (reproducing Alabama law at that time). No Alabama court had ever suggested that this statute did not mean exactly what it said; to the contrary, Alabama courts had confirmed that "§ 13-11-6 list[ed] the *only* aggravating circumstances that could be considered by the sentencing judge." Pet. App. 51a (surveying state court decisions). Accordingly, the Alabama Supreme Court's holding in *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981), that Alabama law did not require the presence of an aggravating fact listed in Section 13-11-6 in order to

impose the death penalty "was 'unexpected and indefensible by reference to the law which had been expressed prior to' [petitioner's] offense conduct." Pet App. 55a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

The State disputes this conclusion on three grounds. First, the State suggests that petitioner had fair warning that he could receive the death penalty because *Kyzer* was decided before petitioner's resentencing. BIO 21. But the relevant time frame, for purposes of due process retroactivity analysis, is not when any court proceeding occurred, but when the "the conduct at issue" was committed. *Bouie*, 378 U.S. at 354; *accord id.* at 350. *Kyzer* did not exist when petitioner committed his crime; it was decided two years later. Pet. App. 67a. It thus could not be applied to petitioner without implicating the Due Process Clause.

Second, the State argues that it was "clear from the face of § 13-11-2 that the murder of a police officer was a capital offense for which the death penalty could be imposed." BIO 21. Not so. The text of that statute required the State to prove "aggravation" in addition to the offense charged. And Section 13-11-4 – which the State ignores throughout its brief – provided that a sentencing court needed to find "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6" in order to impose the death penalty. No Alabama court has ever found that any of the aggravating factors listed in Section 13-11-6 pertained to petitioner's crime.

Third, the State contends that *Kyzer* was not "unexpected and indefensible" because it merely cured the supposed "anomaly" that Section 13-11-6

did not include an aggravating circumstance that corresponded to the crime, listed in Section 13-11-2, of killing a police officer. BIO 26. But killing a police officer could have accompanied several of the aggravators listed in Section 13-11-6, Pet. App. 97a-98a; the fact was simply that none was present in this case. Furthermore, as the district court explained, there was nothing illogical about listing killing a police officer in Section 13-11-2 as a form of aggravated murder but not listing an aggravating circumstance in Section 13-11-6 that *always* corresponded to that crime. That was the only way under Alabama law at that time to dictate a sentence of mandatory life imprisonment without parole for the generic offense. Pet. App. 71a.

In any event, even a truly "anomalous situation" does not license a state court to rewrite a "narrow and precise" criminal statute retroactively. *Bouie*, 378 U.S. at 352. And that, at the very least, is what happened here. As the Alabama Supreme Court itself has since conceded, in the course of expressly disavowing its reasoning in *Kyzer*, the "plain language" of Alabama law at the time of petitioner's crime expressly provided that the death penalty could not be imposed unless an aggravating circumstance listed in Section 13-11-6 was present. *Ex parte Stephens*, 982 So.2d 1148, 1153 & n.6 (Ala. 2006). No state court decision suggested – nor could one have – that the law did not mean exactly what it said. *Id.* The Due Process Clause, therefore, forbade the Alabama courts here from declining to apply that statutory scheme "as it was written," *Bouie*, 378 U.S. at 355, not to mention as later construed in *Stephens*. *See Fiore v. White*, 531 U.S. 225 (2001) (per curiam).

II. This Court Should Review The Eleventh Circuit's Ineffective Assistance Holding.

The State's defense of the Eleventh Circuit's ineffective assistance holding replicates the Eleventh Circuit's confusion between state and federal law, thereby confirming that certiorari is necessary to foreclose such errors in future cases.

The State argues that petitioner's counsel's performance at resentencing satisfied the Sixth Amendment because he could fairly have assumed "that federal courts would respect the state court's decision on a purely state law question" – namely, whether an aggravating circumstance listed in Section 13-11-6 was necessary to impose the death penalty. BIO 32-33. But counsel's assumption that petitioner's eligibility for the death penalty was a "purely state law question" was exactly what rendered his performance ineffective. More than twenty years before petitioner's resentencing, *Bouie* had explained that the Due Process Clause forbids a state court from retroactively applying a state-law decision that unforeseeably expanded the coverage of a criminal statute. It thus was unreasonable and inept for petitioner's counsel to fail to raise this due process objection to the resentencing court's clear error in applying *Kyzer* to petitioner.

The State also asserts that counsel's deficient performance did not prejudice petitioner because applying *Kyzer* to petitioner did not violate due process. BIO 33. The Eleventh Circuit resolved petitioner's ineffective assistance claim strictly on performance grounds, so this Court need not necessarily address this prejudice-prong argument. In any event, petitioner's fair warning claim is

meritorious. *See supra* at 8-10. The claim would have made plain that petitioner was constitutionally ineligible for the death penalty. Counsel's failure to raise the argument at resentencing thus prejudiced petitioner in the worst possible way: it caused him to be slated for execution for an act that was not punishable by death.[4] This Court should not allow such a miscarriage of justice to go unremedied.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] To the extent the State suggests (BIO 33) that the prejudice inquiry should turn on how the state resentencing court actually might have resolved a *Bouie* objection, instead of what federal law, properly construed, would have required it do, this Court has rejected that notion. *See Lockhart v. Fretwell*, 506 U.S. 364, 370-72 (1993).

Respectfully submitted,

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PETITIONER'S BRIEF

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IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

GRANT CULLIVER,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment part of a "second or successive" petition under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

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BRIEF FOR PETITIONER

Petitioner Billy Joe Magwood respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a) is published at 555 F.3d 968. The opinion of the United States District Court for the Middle District of Alabama (Pet. App. 23a) that addresses the question presented is published at 481 F. Supp. 2d 1262.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2009. Pet. App. 1a. A timely petition for rehearing was denied on March 24, 2009. Pet. App. 100a-101a. On June 15, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 7, 2009. *See* 08A1116. On November 16, 2009, this Court granted the petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2244(b) provides in relevant part:

"(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

28 U.S.C. § 2254(a) provides that: "[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Relevant provisions of Alabama's statutes governing capital punishment, as they existed at the time of petitioner's crime, are reproduced at Pet. App. 91a-99a.

STATEMENT OF THE CASE

An Alabama court sentenced Petitioner Billy Joe Magwood to death for an act that was not a death-eligible offense under Alabama law when he committed it. He obtained federal habeas relief from that sentence (on grounds unrelated to his death eligibility), but the state court again sentenced him to death for the same act. A federal district court then granted petitioner habeas relief from this new sentence, holding that it violates clearly established due process law to execute someone for an act that was not a death-eligible offense when he committed it. Without disputing the correctness of that constitutional holding, the Eleventh Circuit reversed the district court's decision and reinstated petitioner's death sentence. Even though this is petitioner's first habeas petition challenging his current sentence, the Eleventh Circuit held that petitioner's due process claim was part of a "successive" petition under 28 U.S.C. § 2244(b) because petitioner could have, but did not, challenge his earlier (and subsequently vacated) death sentence on the same constitutional ground.

1. Petitioner "was a sound person before his service with the United States Army in Viet Nam," for which he received a Purple Heart. Pet. App. 105a. After that service, however, he began to develop paranoid schizophrenia and started abusing his pain medication. *Id.* In 1975, he pleaded *nolo contendere* to illegally possessing the medication and was sentenced to four years in the Coffee County, Alabama jail. During that confinement, petitioner

was unable to obtain medication or treatment for his mental illness, and his condition worsened.

By the end of his jail term, petitioner had developed full-blown schizophrenia. He believed that the Army was sending him orders through surgically implanted communication devices and warning him that Coffee County authorities, including Sheriff Cornelius Grantham, were interfering with his "missions." Petitioner went so far as to send letters to the Veterans Administration, imploring it to release him from its command by removing the implanted communication devices.[1]

Petitioner was released from jail at the end of his sentence. On March 1, 1979, as petitioner's hallucinations grew more vivid, petitioner approached Sheriff Grantham in front of the jail. After exchanging greetings and in plain view of the sheriff's deputies, petitioner shot and killed the sheriff. Petitioner then exchanged fire with a deputy, got into his car, and drove home. Upon arriving there, petitioner sat unarmed on his front porch until arresting officers arrived.

---

[1] Internal parole and probation reports, which the State did not turn over until after petitioner's resentencing, confirmed that, while incarcerated, petitioner "did not know his date of birth, what day of the week it was, the day of the month, or month of the year. [He] did not have any concept of what parole amounted to and his only interest was getting out of jail and to go to the Walter Reed Hospital for treatment." Habeas Pet. App. 109; *see also Magwood v. Jones*, 472 F. Supp. 2d 1333, 1335-37 (M.D. Ala. 2007).

2. At the time of the killing, Alabama law provided that an individual was subject to the death penalty only if two prerequisites were met.[2] First, the individual had to commit one of the fourteen types of aggravated murder listed in Ala. Code § 13-11-2(a) (1975). Even though crimes on this list were sometimes called "capital offenses," that was something of a misnomer. Before imposing a death sentence, the trial judge also had to make a second finding: that "[o]ne or more of the aggravating circumstances enumerated in section 13-11-6 . . . exist[ed] in the case" and outweighed any mitigating circumstances. *Id.* § 13-11-4; *see also* Pet. App. 51a-55a.[3] Murdering a sheriff while on duty or because of some official or job-related act was a form of capital murder under § 13-11-2(a)(5), but petitioner did not kill Sheriff Grantham under any of the aggravating

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[2] Alabama law as it existed in 1979 is reproduced in the appendix to the district court's opinion, which appears at Pet. App. 91a-99a. All references to Alabama statutes in this brief, unless otherwise noted, are to the law as it existed in 1979. These statutes were recodified and amended in 1981, without making any substantive changes that are relevant to this case.

[3] Alabama law still uses this nomenclature. Thus, "a capital offense under [Alabama's recodified and amended death penalty statutes] is not an offense for which a defendant is automatically 'eligible' for the death penalty." Ed Carnes, *Alabama's 1981 Capital Punishment Statute*, 42 Ala. Lawyer 456, 483 n.26 (1981). Instead, a defendant is eligible for the death penalty only if he is convicted of a capital offense *and* at least one enumerated aggravating circumstance exists. *Id.* at 483.

circumstances enumerated in § 13-11-6. Pet. App. 57a.[4]

The State nonetheless charged petitioner with capital murder *and* sought the death penalty. It appointed two lawyers to represent him – a childhood friend of Sheriff Grantham and someone who had known the sheriff socially and professionally for twenty-five years. At the same time, the State remitted petitioner to Searcy State Hospital, where three state psychiatrists unanimously confirmed his paranoid schizophrenia. The psychiatrists also concluded that petitioner "was insane at the time of his admission to their hospital, at the time [the doctors] issued their report, and probably at the time of the commission of the offense." Pet. App. 26a. Petitioner, one psychiatrist emphasized, was "not a borderline case"; he was "completely out of touch with reality." *Magwood v. State*, 426 So. 2d 918, 921, 923 (Ala. Crim. App. 1982).

After receiving the State's psychiatric report, the Alabama trial court ordered that petitioner be "restored to his right mind," Tr. Rec. 387, by means of antipsychotic drugs potent enough to "put anyone . . . totally asleep." *Magwood v. Smith*, 608 F. Supp. 218, 226 (M.D. Ala. 1985). After months of receiving such medication, the court deemed petitioner legally competent to stand trial. *Id.* at 227.

---

[4] The aggravating circumstances that were enumerated in § 13-11-6 are reproduced at Pet. App. 97a-98a. They included having been convicted of another capital or serious felony; committing the crime for pecuniary gain; or committing the crime during the course of other enumerated felonies.

Petitioner's trial lasted a day and a half. "[T]he State's only evidence that [petitioner] was sane came from two general practitioners who examined [petitioner] for 15 and 30 minutes, respectively, and a clinical psychologist who conceded that [petitioner] suffered from paranoid schizophrenia and that he examined [petitioner] two years after the offense conduct and while he was strongly medicated." Pet. App. 26a. The trial court refused to compel testimony of any of the three doctors from Searcy State Hospital or to grant petitioner funds to hire a psychiatrist as an expert witness of his own. The jury, whose members included numerous acquaintances of the sheriff, *see Magwood v. State*, 426 So. 2d 918, 924 (Ala. Crim. App. 1982), rejected petitioner's insanity defense and found him guilty.

Even though it recognized that none of the aggravating circumstances in Section 13-11-6 accompanied petitioner's crime, the trial court sentenced petitioner to death. *Magwood*, 426 So. 2d at 928 (reprinting trial court sentencing order of June 30, 1981). The trial court justified this act by referencing a decision from the Alabama Supreme Court, *Ex parte Kyzer*, 399 So. 2d 330, 338 (Ala. 1981), that was handed down two years *after* petitioner's crime. In that decision, the Alabama Supreme Court stated that even though "[a] literal and technical reading" of Alabama statutes limited the universe of potential aggravators to those listed in Ala. Code § 13-11-6, Alabama law should not limit sentencing courts in this manner. *Kyzer*, 399 So. 2d at 337. Thus, the Alabama Supreme Court said that a trial court could treat the very commission of a crime listed in § 13-11-2(a) as an "aggravating

circumstance" rendering the defendant death-eligible. *Kyzer*, 399 So. 2d at 338.

3. After the Alabama courts upheld petitioner's conviction and sentence on direct and post-conviction review, petitioner filed a federal habeas petition. The U.S. District Court for the Middle District of Alabama left his conviction in place, noting that "while . . . the evidence seems particularly strong that petitioner was insane at the time of the offense, this issue is properly left to the state courts." *Magwood v. Smith*, 608 F. Supp. 218, 227 (M.D. Ala. 1985). But the district court granted habeas relief as to petitioner's death sentence. The district court held that the sentencing court had inexplicably failed to find any mitigating circumstances relating to petitioner's mental illness. *Id.* at 228. The Eleventh Circuit affirmed this decision and mandated "a new sentencing hearing in order to satisfy the constitutional standards for sentencing in death penalty cases." *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). The State declined to seek review in this Court.

4. In 1986, "the state trial court conducted a 'complete and new' sentencing hearing, including 'a new assessment of all of the evidence, arguments of counsel, and law' and a 'new . . . opportunity for the parties to submit evidence.'" Pet. App. 27a (quoting portion of state court order reproduced at Pet. App. 103a). Again applying *Kyzer*, the trial court sentenced petitioner to death notwithstanding the State's failure to allege, and the court's failure to find, any aggravating circumstance listed in former Ala. Code § 13-11-6. Pet. App. 102a-107a. The Alabama courts upheld this new sentence on direct

appeal. *Magwood v. State*, 548 So. 2d 512 (Ala. Crim. App. 1988); *Ex parte Magwood*, 548 So. 2d 516 (Ala. 1988).

5. Petitioner then sought post-conviction relief from his new death sentence in the Alabama courts. Among other things, he argued that "the absence of any statutory aggravating circumstance and the lack of notice given by the 1975 Act for the retroactive application of the decision in *Kyzer* rendered [his] sentence unconstitutional under the . . . 14th Amendment[]." Pet. App. 69a (quoting petitioner's brief). The Alabama Court of Criminal Appeals denied relief, rejecting the due process claim "on the merits." Pet. App. 68a; *see Magwood v. State*, 689 So. 2d 959 (Ala. Crim. App. 1996).

6. In 1997 (after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132 (1996)), petitioner filed the federal habeas petition at issue here in the U.S. District Court for the Middle District of Alabama. The petition does not challenge petitioner's conviction. Instead, it is limited to challenging the "1986 Judgment Sentencing Petitioner to Death." Petition at 1.[5] In this application, petitioner renewed, among other arguments, his Fourteenth Amendment due process claim.

The district court granted relief, holding that the Alabama courts violated clearly established Due

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[5] Petitioner separately, and simultaneously, sought leave to file a successive petition challenging his conviction only. The Eleventh Circuit denied that motion. *In re Magwood*, 113 F.3d 1544 (11th Cir. 1997).

Process Clause limitations on the retroactive application of new law by applying the formulation of Alabama law announced in *Kyzer* at petitioner's sentencing. The district court explained that *Kyzer* contravened "the literal meaning" and "plain text" of Alabama's death penalty statutes and "had no support in prior case law." Pet. App. 62a-63a. It therefore "seems beyond dispute," the district court continued, "that the judicial construction of [Alabama death penalty statutes] announced in *Kyzer* was 'unexpected and indefensible by reference to the law which had been expressed prior to' [petitioner's] offense conduct." Pet. App. 55a (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

The State had not argued that petitioner's due process claim was subject to AEDPA's restrictions on claims asserted in "second or successive" habeas petitions. Pet. App. 63a. The district court nonetheless "point[ed] out" that the claim was not subject to these restrictions. Pet. App. 63a. Relying on hornbook law, the district court explained that although "the state court committed the same [due process] error" at petitioner's first sentencing, "habeas petitions challenging the constitutionality of a resentencing proceeding are not successive to petitions that challenge[d] the . . . original sentence." Pet. App. 65a (citing 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3b, at 1412 (5th ed. 2005)).

The district court also held that petitioner was entitled to habeas relief because his counsel had

provided constitutionally ineffective assistance of counsel at his resentencing. Pet. App. 82a-89a. It rejected various other claims.[6]

7. The State appealed. After the case was briefed but before the Eleventh Circuit heard oral argument, the Alabama Supreme Court published a decision repudiating *Kyzer*, describing *Kyzer*'s statement that a sentencing court did not need to find a statutory aggravating circumstance in order to impose the death penalty as "pure dicta," and, worse yet, simply wrong. *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006).[7] Applying Alabama's recodified death penalty statutes, which it deemed identical in all relevant respects to the statutes on the books in 1979, the Alabama Supreme Court explained: "The statutory scheme clearly permits the trial court and advisory jury to consider *only those aggravating circumstances listed in § 13A-5-49* [formerly § 13-11-6]. Our dicta to the contrary in *Kyzer* was incorrect." *Stephens*, 982 So. 2d at 1153 (emphasis added). This decision made clear not only that Magwood's crime

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[6] These claims included: (1) a *Brady* challenge to the State's suppression of internal reports that belied testimony that its witnesses gave concerning petitioner's mental illness; and (2) an inadequate investigation claim concerning petitioner's counsel's failure to learn that he had a wife and children; to learn any details about his military service in Vietnam; or to learn about the recorded development of his hallucinations concerning the sheriff in the weeks leading up to the crime. Pet. App. 16a-22a, 80a-82a.

[7] *Stephens* is recorded as having been decided on July 28, 2006, but the decision was not released for publication until July 8, 2008.

was not a death-eligible offense when he committed it, but that it had *never* been a death-eligible offense.

The State nonetheless pressed ahead with its appeal, and the Eleventh Circuit reversed the district court's grant of habeas relief. The Eleventh Circuit did not question that petitioner's sentence violated clearly established due process principles, since he did not commit a death-eligible offense. Nor did the court of appeals question that petitioner's habeas application challenging his 1986 death sentence should generally be regarded as a first petition challenging that sentence. The Eleventh Circuit ruled, however, that petitioner's due process claim should be treated as though raised in a successive petition because the constitutional grounds for the claim had been "available at his original sentencing" as well as at his 1986 resentencing. Pet. App. 15a.

The Eleventh Circuit also held that all of petitioner's other claims lacked merit. Pet. App. 16a-22a. It later denied rehearing without comment. Pet. App. 100a-101a.

8. Petitioner sought this Court's review of the Eleventh Circuit's successive petition and ineffective assistance rulings. This Court granted certiorari limited to the successive petition ruling. 130 S. Ct. ___ (2009).

SUMMARY OF ARGUMENT

A claim in a prisoner's first habeas petition to challenge a newly imposed sentence cannot be deemed part of a second or successive petition.

A. The text of AEDPA, which allows the filing of "an application for a writ of habeas corpus on behalf

of a person in custody pursuant to *the judgment* of a State court," 28 U.S.C. § 2254 (emphasis added), indicates that habeas petitions are counted with respect to each particular state-court judgment. When a new judgment is entered, the counting of petitions begins afresh. Similarly, AEDPA directs courts to determine whether "applications," not claims, are successive. 28 U.S.C. § 2244(b). Thus, an application *as a whole* must be either a first one or a successive one. A particular *claim* in a first application challenging a new judgment cannot somehow be singled out as successive.

B. The history of the "second or successive" concept, which AEDPA incorporates, confirms this analysis. The "second or successive" concept developed as a means of administering the "abuse of the writ" doctrine, which is designed to curb repetitive challenges to the *same* judgment. Hence, a petitioner who keeps on losing cannot continue to challenge his judgment. But when a prisoner *succeeds* in obtaining relief from his sentence, thereby vacating that aspect of the original judgment, and is given an entirely new sentence, it makes no sense to limit his ability to bring a first constitutional challenge against that new sentencing judgment.

This Court's precedent is in accord. Since long before AEDPA was enacted, this Court has consistently referred to successive petitions as those challenging the *same* state-court judgment as an earlier petition. And this Court has twice resolved cases – once before AEDPA, once after – on the implicit assumption that a claim in an initial petition challenging a resentencing should be treated as part

of a first petition, even if the prisoner's initial sentence could have been attacked on the same grounds.

C. Requiring courts, as the Eleventh Circuit did here, to analyze initial petitions against new judgments on a claim-by-claim basis and to treat claims based on constitutional arguments that could have been raised against initial (but subsequently vacated) judgments as successive would not only upend the current understanding of the "second or successive" concept, but it would threaten numerous other settled understandings concerning habeas procedure. For instance, if the Eleventh Circuit's analysis were correct, prisoners would be barred from seeking relief from resentencings (or retrials) based on violations of constitutional rules established by intervening decisions from this Court. In addition, the Eleventh Circuit's rule, in conjunction with AEDPA's provision requiring the automatic dismissal of any claim that was presented in a prior habeas petition, would seemingly bar claims against new sentences that are based upon arguments that a prisoner raised in his petition challenging his original sentence – even those based upon the same ground which the prisoner had obtained relief from his original sentence. Such a system would immunize blatant constitutional transgressions at resentencings (or retrials) from federal scrutiny and would raise serious concerns with respect to unconstitutionally suspending the writ of habeas corpus.

ARGUMENT

A CLAIM IN A FIRST HABEAS APPLICATION CHALLENGING A NEW DEATH SENTENCE CANNOT BE TREATED AS PART OF A SECOND OR SUCCESSIVE APPLICATION

The judicial and statutory doctrines governing habeas corpus procedure have sometimes provoked intense debate among the members of this Court. But one basic principle has never been questioned: a successive application, by definition, "challeng[es] the *same* state court judgment" as challenged in a previous federal habeas application. *Panetti v. Quarterman*, 551 U.S. 930, 964 (2007) (Thomas, J., dissenting) (emphasis added). Thus, the leading treatise on habeas corpus practice and procedure explains that the "successive petition doctrine does not apply when . . . a habeas corpus petitioner, who succeeded in overturning a conviction (or sentence) and who is subsequently retried and reconvicted (or resentenced), files a second petition to challenge the new conviction (or sentence)." 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 28.3b, at 1412-13 (5th ed. 2005).

The text, history, and structure of AEDPA, as well as this Court's precedent, all reinforce this framework. The Eleventh Circuit had no warrant to disturb it here.

A. AEDPA's Text

Section 2254 of Title 28 of the United States Code, as amended by AEDPA, invests federal courts with the authority to "entertain an application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). At the same time, Section 2244 directs courts, save in certain specified circumstances, to dismiss "[a] claim presented in a second or successive habeas corpus application under section 2254." *Id.* § 2244(b)(1) & (2).

Taken together, the text of these provisions demonstrates that a habeas application challenging a new judgment for the first time cannot be second or successive in any respect. Section 2254 authorizes the filing of a habeas application seeking relief from "*the* judgment of a State court" – not from "*a* judgment of a State court" and certainly not from "*a prior* judgment of a State court." As is often the case, the use of the definite, unadorned article is deliberate. *See, e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 434-45 (2004). It indicates that any determination under Section 2244(b) of whether a habeas application "under Section 2254" is "successive" must be made with reference to a single, specific state court judgment. If and when a state court enters a *new* judgment, the counting of habeas applications starts over with respect to challenges to the new proceeding that led to that new judgment.

Section 2254's phrase "in custody pursuant to," which precedes the words "the judgment of a State court," reinforces this conclusion. It is elementary that once a state court vacates a judgment and replaces it with a new one, a prisoner is no longer "in custody pursuant to" the original judgment. Instead, he is in custody solely pursuant to the new judgment, even if its terms are the same as the previous one.

See, e.g., Burton v. Stewart, 549 U.S. 147, 153, 156 (2007) (prisoner was "in custody pursuant to" new sentencing judgment, not old one, as soon as new judgment was entered). An initial habeas challenge to that new judgment, therefore, must be a first application under Sections 2254 and 2244(b).

The Eleventh Circuit implicitly recognized this general principle by treating most of petitioner's claims in this case as arising in a first petition. Pet. App. 15a, 16a-22a. Yet the Eleventh Circuit held that petitioner's due process "claim . . . is successive" because he could have challenged his original death sentence on the same ground. Pet. App. 15a-16a. This reasoning cannot be squared with the statutory language just discussed. All of petitioner's current claims challenge the same judgment – the 1986 judgment sentencing him to death. *See* Pet. App. 106a. If petitioner's habeas application challenging that judgment is a first petition with respect to some of his claims that challenge his new sentence (as is undeniably the case), it must be a first petition with respect to *all* of his claims that challenge his new sentence.

Lest there be any doubt, this Court has emphasized that the words "application" and "claim" in AEDPA mean different things. "[F]or purposes of § 2244(b)," an "application" is an indivisible unit "that contains one or more 'claims.'" *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); *see also Artuz v. Bennett*, 531 U.S. 4, 9-10 (2000) (same). Thus, in *Artuz*, when a state tried to argue that an application containing both procedurally barred and nonbarred claims was "'properly filed' *as to* the nonbarred claims, and not 'properly filed' *as to* the rest," this

Court rejected the argument as contrary to "[o]rdinary English." 531 U.S. at 10 (emphasis in original). Section 2244(d), this Court explained, "refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed.'" *Id.*

So too here. Section 2244(b) requires courts to decide whether a habeas "application" is successive. It nowhere contains the "peculiar suggestion," *Artuz*, 531 U.S. at 10, that a single application challenging a single judgment can be both successive and not successive. To the contrary, it requires a court first to determine whether an application – that is, a whole filing – is successive. If it is, then the Section provides rules for determining whether each individual "claim" in the application may go forward. 28 U.S.C. § 2244(b)(2). But if the application is *not* successive, then a court has no statutory authority to dismiss any particular "claim" on the ground that it is somehow "second or successive." Pet. App. 15a, 16a. This is especially so when, as here, the claim is being raised for the *first* time.

B. AEDPA's History and Precedent

The historical development of the "second or successive" phrase eliminates any indeterminacy in the text of AEDPA. "The phrase 'second or successive petition' is a term of art given substance in [this Court's] prior habeas corpus cases," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), "including decisions predating the enactment of [AEDPA]." *Panetti*, 551 U.S. at 943-44 (2007); *see also id.* at 964 (Thomas, J., dissenting) ("Before AEDPA's

enactment, the phrase 'second or successive' meant the same thing as it does today."); *see generally Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."). The evolution of the "second or successive" concept demonstrates that a habeas application cannot be second or successive if it does not challenge the same judgment as a previous application did.

1. The "second or successive" phrase has its roots in the origins of habeas corpus procedure itself – the procedure that developed centuries ago to allow prisoners to seek relief from illegal punishment. In light of this weighty purpose, the writ was revered as "the most celebrated writ in the English law," 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129 (1768), and as a "great constitutional privilege" in the United States, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.).

Yet an order denying habeas relief was not appealable at common law, in either England or America. *McCleskey v. Zant*, 499 U.S. 467, 479 (1991). Instead, "[s]uccessive petitions served as a substitute for appeal." *Id.* "A person detained in custody [could] proceed from court to court until he obtained his liberty." *Cox v. Hakes*, (1890) 15 A.C. 506, 527 (H.L.). Even if the person was denied relief by one judge, "'[a] renewed application could be made to every other judge or court in the realm, and each

court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not be influenced by the previous decisions refusing discharge.'" *McCleskey*, 499 U.S. at 479 (quoting W. CHURCH, WRIT OF HABEAS CORPUS § 386, at 570 (2d ed. 1893)). In other words, in English and American courts alike, traditional "res judicata did not attach to a court's denial of habeas relief." *Id.*

As appellate review of habeas denials became available in American courts, the rationale for unrestricted successive petitions eroded. *See id.* at 479-80. At the same time, this Court continued to recognize the status of the writ of habeas corpus "as a privileged writ of freedom," *Salinger v. Loisel*, 265 U.S. 224, 232 (1924), noting that "if government [is] always [to] be accountable to the judiciary for a man's imprisonment, access to the courts on habeas must not be . . . impeded" by "[c]onventional notions of finality in litigation," *Sanders v. United States*, 373 U.S. 1, 8 (1963) (internal quotation marks and citation omitted). Accordingly, this Court adopted some restrictions on successive filings, while continually adhering to the common-law principle that "res judicata is inapplicable to habeas proceedings," *Sanders*, 373 U.S. at 8 (internal quotation marks and citation omitted).

The "abuse of the writ" doctrine is the product of this compromise. The doctrine – as it developed and has now been codified in AEDPA, *see* 28 U.S.C. § 2244(b) – amounts to a "modified," or softer, "res judicata rule," *Felker v. Turpin*, 518 U.S. 651, 664 (1996). It is designed to curb needlessly repetitive litigation in situations in which prisoners have already been accorded a fair hearing and a right to

appeal a denial of relief, while still allowing the Great Writ to serve its historical purposes. *See McCleskey*, 499 U.S. at 480-82.

The substance of this compromise – that is, when claims in successive petitions are now allowed to proceed and when they are not – is not at issue here. The important point is that the limitations imposed by the abuse-of-the-writ doctrine on successive petitions are designed to restrict the kinds of repetitive challenges that, at best, took the place of appeals before prisoners obtained the ability genuinely to appeal denials of relief and, at worst, gave rise to endless piecemeal litigation with different claims being asserted in each new filing. These limitations, in other words, are designed to curb filings from prisoners who repeatedly challenge their same confinement and keep losing.

This purpose is not served to the extent an individual *obtained relief* from his original sentence and now seeks to challenge his new sentence for the first time.[8] A habeas petition challenging a new sentence, after all, challenges a judgment that had not yet been imposed at the time of the prisoner's initial habeas application. So it makes no sense to treat a claim in such a petition as though made in a successive petition.

Nothing in the Eleventh Circuit's opinion directly disputes this notion. The Eleventh Circuit, in fact,

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[8] Of course, when a prisoner, such as petitioner, obtains habeas relief from his sentence but not his conviction, any habeas petition after his resentencing that challenged his *conviction* would be successive.

seems to accept that a claim advanced against a new sentence cannot be deemed part of a successive petition. Pet. App. 12a, 15a. Yet the Eleventh Circuit still found petitioner's due process claim barred, asserting that the claim "challenge[s] [a] component of the original sentence that was not amended." Pet. App. 15a.

That assertion is simply incorrect. Unlike a situation where a sentence is composed of distinct pieces, such as a prison term and a supervised release term, a death sentence is a single, indivisible unit. Thus, when petitioner obtained habeas relief from his 1981 death sentence, that sentence was vacated in its entirety and replaced in 1986 with a wholly new death sentence. Indeed, as the Alabama trial court explained at the resentencing proceeding, the 1986 sentence was "the result of a complete and new assessment of all the evidence, arguments of counsel, and law as given by the United States Courts and Alabama Courts." Pet. App. 103a. Petitioner's due process claim thus unquestionably challenges a new and different sentence than the claims in his habeas petition seeking relief from his 1981 judgment challenged.[9]

Nothing about this reality encourages prisoners to "sleep on their claims," BIO 18, or contravenes

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[9] For these same reasons, the Eleventh Circuit also was incorrect when it asserted that petitioner's "[due process] claim was available at his original sentencing." Pet. App. 15a. Because petitioner's current due process claim challenges a different sentence than any claim he could have advanced against his 1981 sentence, it is a new and *different* claim.

AEDPA's policy of "restrict[ing] repetitive habeas petitions," Pet. App. 14a (internal quotation marks and citation omitted). Prisoners cannot challenge *resentencings* unless they first succeed in obtaining habeas relief from their existing sentences. They thus have every reason to raise every possible claim against their initial sentences. But when a prisoner obtains relief and a state seeks to resentence him to death, the state court must abide by the Constitution – every aspect of the Constitution – at the resentencing proceeding. If the court does not do so, the prisoner can seek and obtain habeas relief from his new injury on the basis of clearly established constitutional law, regardless of whether he could have challenged his original (now vacated) sentence on the same ground.

Any other analysis would turn the relationship between habeas corpus procedure and res judicata on its head, for petitioner's claim would not even be barred under ordinary res judicata principles. The doctrine of res judicata (or, more specifically, claim preclusion), allows a subsequent lawsuit between the same parties whenever the new lawsuit is based upon a "different cause or demand" than the first. *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948). That being so, this Court has held a prior lawsuit respecting one alleged injury does not bar a subsequent lawsuit challenging a new injury when the new injury occurred "subsequent to [the earlier] judgment." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). This is so even if the new injury is of the same nature as the first injury and was caused by the same allegedly wrongful conduct, such as may occur in the context of an abatable

nuisance or an antitrust conspiracy giving rise to multiple, identical acts of monopolization. *Id.* at 327-28. Nor does it make any difference whether the new claim relies on a legal argument that could have been advanced in the earlier lawsuit. *Id.*; *see also United States v. Stone & Downer Co.*, 274 U.S. 225 (1927) (prior judicial determination as to the proper classification of imported goods under tariff schedules did not bar a subsequent action involving a subsequent importation of identical goods); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE JURISPRUDENCE § 4406 (2d ed. 2007) ("If the second lawsuit involves a new claim or cause of action, the parties may raise assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action.").

As applied to this case, the injury for which a habeas corpus application seeks relief is an unconstitutional sentence under the "judgment of a State court." 28 U.S.C. § 2254. Petitioner has filed two separate applications against two separate judgments, and the second judgment post-dates the first application. Therefore, the two judgments the State has obtained during its quest to execute petitioner for a crime that was not a death-eligible offense would be separate transactions even under the more restrictive successive-litigation doctrine of res judicata.[10]

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[10] Of course, ordinary collateral estoppel and *stare decisis* principles, which apply with full force in habeas proceedings,

3. This Court's decisions describing and applying the "second or successive" concept support the conclusion that petitioner's due process claim must be treated as part of a first petition. This Court has found habeas applications to be second or successive when they have challenged the *same* state-court judgment as a previous one. *See Burton*, 549 U.S. at 153 (application was successive because it "contest[ed] the same custody imposed by the same judgment of a state court" as did a previous application); *Panetti*, 551 U.S. at 964-65 (Thomas, J., dissenting) (application is successive when it challenges "a state-court judgment that had been previously challenged in a federal habeas application."). But this Court has never suggested, much less held, that an application challenging a different judgment could be successive.

Indeed, this Court twice has implicitly recognized that an application filed against a new state-court judgment cannot be deemed successive in any respect. In *Richmond v. Lewis*, 506 U.S. 40 (1992), a state prisoner who had previously obtained habeas relief challenged the new death sentence that had been imposed at resentencing. As the federal court of appeals' decisions in the case made clear, the prisoner's primary claim – that one of the

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still restrict a state prisoner's ability to renew any legal argument in a habeas application challenging a retrial or resentencing that was raised and rejected in habeas litigation over his initial conviction or sentence. *See Sunnen*, 333 U.S. at 597-98 (collateral estoppel); *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997) (*stare decisis*).

aggravating factors supporting his sentence was unconstitutionally vague – was based on an argument that he could have, but had not, raised against his original sentence. *See Richmond v. Lewis*, 948 F.2d 1473, 1480 (9th Cir. 1992); *Richmond v. Ricketts*, 774 F.2d 957, 960-61 (9th Cir. 1985); C.A. App. C (Petitioner's Specification of Claims Raised in this Petition and in *Richmond v. Cardwell*) at 11.

This Court reviewed the prisoner's vagueness claim on the merits and held that he was entitled to habeas relief. Neither the majority nor the concurring or dissenting opinions suggested that the prisoner's claim should be treated as anything other than part of a first petition, even though contemporaneous law gave this Court the authority to inquire *sua sponte* whether the petition was successive. *See, e.g., Femia v. United States*, 47 F.3d 519, 524 (2d Cir. 1995); *Jones v. Estelle*, 692 F.2d 380, 384 n.5 (5th Cir. 1982). Under these circumstances, this Court's decision to grant review and to reach the merits indicates that it regarded the claim as part of a first petition. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper.") (citations omitted).

This Court's decision in *Burton* likewise rests on the presumption that a claim in an initial habeas petition challenging a new judgment is necessarily a first petition. Burton was convicted and sentenced in state court in 1994. He obtained relief from his sentence, and was resentenced in 1998. Burton filed

a federal habeas application later in 1998. After that petition was denied, Burton filed another application in 2002, this time arguing that his new sentence violated the Sixth Amendment because it was based on facts found by the judge instead of his jury.

The state argued that Burton's 2002 application was successive. He responded that it was not, asserting that the 1998 application had challenged only the 1994 judgment – not the 1998 judgment that followed his resentencing. If the Eleventh Circuit's rule in this case were correct, then Burton's assertion would have been irrelevant, for Burton *could have* challenged the sentence in his 1994 judgment on the same Sixth Amendment ground as he was challenging his 1998 resentencing. But this Court assumed that it *did* matter which judgment the 1998 petition challenged, finding it necessary to assure itself that Burton's 1998 application actually had challenged the 1998 judgment (the *same* judgment his 2002 application challenged) before concluding that his 2002 application was successive. *Burton*, 549 U.S. at 156.

Even more recently, Justice Souter summarized this Court's understanding of the second or successive concept, explaining how it turns on whether a habeas application challenges the same state-court judgment as an earlier application:

> For purposes of claim preclusion in habeas cases, the scope of "transaction" is crucial in applying AEDPA's limitation on second or successive petitions . . . . *The provisions limiting second or successive habeas petitions regard the relevant "transaction" for purposes of habeas claim preclusion as*

> *the trial that yielded the conviction or sentence under attack; once a challenge to that conviction or sentence has been rejected, other challenges are barred even if they raise different claims.*

Mayle v. Felix, 545 U.S. 644, 673 (2005) (Souter, J., dissenting) (emphasis added). The flip side of this summary, which was accepted by everyone else on the Court, is that when an initial habeas application is successful, and then a later one challenges a *new* trial or sentencing proceeding, that later filing challenges a different transaction, so no part of it can be second or successive. That rule controls this case.

C. AEDPA's Structure

The "second or successive" rule the Eleventh Circuit adopted in this case is unprecedented, so there is no body of case law that illustrates its implications.[11] But a moment's reflection on the way

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[11] The Eleventh Circuit suggested (Pet. App. 14a-15a) that its holding was consistent with the Second Circuit's decision in *Galtieri v. United States*, 128 F.3d 33 (2d Cir. 1997). But *Galtieri* addressed a situation materially different from petitioner's: there, a prisoner's original sentence had merely been amended following habeas relief limited to imposing a new term of supervised release. The Second Circuit held that his new habeas filing was successive "to the extent that it challenge[d] the underlying conviction or s[ought] to vacate any component of the original sentence *that was not amended*" (that is, any component other than his new term of supervised release). *Id.* at 38 (emphasis added); *see also supra* at 22 (recognizing that new claims challenging unamended components of original judgments may be deemed successive). Nothing in *Galtieri* indicated that an application challenging an

AEDPA works reveals that the Eleventh Circuit's decision would illegitimately insulate a wide range of new judgments, following initial grants of habeas relief, from collateral attack.

As noted above, Section 2244(b) requires courts to decide as a threshold matter whether a habeas application – that is, the entire filing – is successive. *See supra* at 17-18. If it is, then the Section allows courts to analyze the filing on a claim-by-claim basis, determining whether each individual "claim" in the application may go forward. Generally speaking, subsection (1) provides that if a claim in a successive petition has already been litigated, it must be dismissed; subsection (2) provides that if the claim is new, it can proceed only if it is based on a new and retroactive decision from this Court or it is based on new evidence that clearly and convincingly establishes the applicant's innocence. *See* 28 U.S.C. §§ 2244(b)(1) & (2).

This framework makes clear that once a court determines that an application is generally a first application because it challenges a new sentence, the court may not treat *any* claims in the application as

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entirely new sentence could ever be treated as successive in any respect. Indeed, the Second Circuit allowed a claim in such an application to proceed as part of a first petition in *Esposito v. United States*, 135 F.3d 111 (2d Cir. 1997). *See also Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003) ("[E]ven a petition that has been finally adjudicated on the merits will not count for purposes of the successive petition rule unless the second petition attacks the *same judgment* that was attacked in the prior petition.") (internal quotation marks and citation omitted) (emphasis added).

successive. The viability of individual claims comes into play under the abuse of the writ doctrine only if the application itself has already been deemed successive.

But if, as the Eleventh Circuit held, a claim in a first application challenging a new judgment on grounds "available at [the prisoner's] first sentencing" (Pet. App. 15a) must somehow be regarded as part of a second or successive petition (while other claims remain part of a first petition), then that rule would have to apply even when a claim in such an application is based on an intervening decision from this Court. Consider, for example, a hypothetical defendant who was convicted based in part on a nontestifying witness's custodial statement to the police. Assume that the defendant's conviction became final in 2000 and that he later received federal habeas relief on some other basis, having not challenged the custodial statement. Next, assume that the defendant was reconvicted in 2005 based on the same out-of-court testimony. Under the Eleventh Circuit's system, the prisoner would be unable to seek habeas relief on the basis of the 2005 trial's clear violation of the Confrontation Clause as explicated in *Crawford v. Washington*, 541 U.S. 36 (2004). After all, the prisoner could have argued that his initial conviction was invalid on confrontation grounds (although he presumably would have lost that claim given the state of the law in 2000). And *Crawford* is not – as Section 2244(b)(2) requires of claims in successive petitions – retroactive, *see*

Whorton v. Bockting, 549 U.S. 406 (2007), or relevant to establishing actual innocence.[12]

What is more, if a claim in a first application challenging a new judgment on a ground available at the prisoner's first sentencing must now be regarded as part of a second or successive petition, then – contrary to the Eleventh Circuit's implicit suggestions (*see* Pet. App. 10a, 13a) – it should be immaterial whether the prisoner challenged his first sentence on that ground, only to have the federal court grant relief on some other ground and thus decline to reach the argument. Indeed, prisoners who challenged their previous sentences on the same grounds would be, if anything, worse off than those who did not. Whereas Section 2244(b) allows new claims in successive petitions to proceed under highly limited circumstances, the Section requires courts *without exception* to dismiss claims that were "presented in a prior application." 28 U.S.C. § 2244(b)(1).

In fact, the Eleventh Circuit's reasoning would render new judgments committing *the same violations that triggered habeas relief in the first*

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[12] The State, in its brief in opposition to certiorari, disputed that the Eleventh Circuit's ruling would "prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court." BIO 17. But courts "routinely treat[]" applications as successive when they raise "claims alleged to be 'new' due to the Supreme Court's changing the law." *Sustache-Rivera v. United States*, 221 F.3d 8, 14 (1st Cir. 2000). And the State provided no reason why a prisoner in petitioner's position would be exempted from this general rule, except for receiving a new judgment.

place immune from collateral challenge. Just like a prisoner challenging his new sentence on grounds the first habeas court declined to reach, a prisoner challenging his new sentence on grounds on which he previously obtained relief would be challenging his sentence on a constitutional ground that was asserted against his original sentencing. Thus, once again, Section 2244(b)(1) would require the claim to be dismissed. This result would be not only starkly counterintuitive and unfair, but could well violate the constitutional prohibition against suspending the writ. *See* U.S. Const. art. I, § 9, cl. 2 (Suspension Clause).

* * *

Until the Eleventh Circuit's decision in this case, a simple, straightforward rule governed habeas challenges to retrials and resentencings: such challenges always constituted first petitions because they challenged new judgments. The Eleventh Circuit's decision throws this previously settled state of affairs into disarray – generating confusion for courts and potential unfairness to parties in an area already fraught with high-stakes procedural complexity. This Court should restore the *status quo ante*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 09-158

In the
Supreme Court of the United States

BILLY JOE MAGWOOD,
Petitioner,
v.
TONY PATTERSON, Warden, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

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(CAPITAL CASE)
QUESTION PRESENTED

When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment part of a "second or successive" petition under 28 U.S.C. §2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented centers on 28 U.S.C. §2244(b), the Antiterrorism and Effective Death Penalty Act's ban on the filing of "second or successive" habeas petitions by state prisoners. To assist the Court, Respondents reproduce §2244(b) and AEDPA's similar provisions for federal prisoners, 28 U.S.C. §2244(a) and §2255(h), in the appendix. App. 1a-4a.

INTRODUCTION

Billy Joe Magwood murdered Sheriff Neil Grantham. Magwood was sentenced to death after an Alabama trial court determined that the aggravating circumstance of murdering of a sheriff outweighed the two mitigating circumstances of age (27) and lack of a violent criminal history. A federal district court granted Magwood a conditional writ of habeas corpus after finding that the state court failed to consider two additional mitigating circumstances. The writ contained a single condition: Reweigh the same aggravating circumstance against four mitigating circumstances, not two. The state court complied and again sentenced Magwood to death.

That was 24 years ago.

For the past 13 years, this case has been mired in a second round of federal habeas litigation in which the primary (and only remaining) claim is one that could have been adjudicated in the mid-1980s. Specifically, Magwood claims that he did not have fair warning in 1978 that murdering a sheriff rendered him eligible for the death penalty under Alabama law. Magwood concedes in the question presented that he "could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds" in his first habeas petition. Pet. i. In fact, Magwood was *ordered* to raise all possible grounds in his first petition. App. 12a. He simply failed to do so.

Section 2244(b)(2) bars any claim raised in a "second or successive application under section 2254" that was not raised in the petitioner's "prior application," unless one of two exceptions are met. Magwood cannot meet either exception. Instead, Magwood argues that his fair-warning claim lies outside of §2244(b)(2)'s reach because his second habeas petition is the first to attack the judgment springing from resentencing.

The court of appeals rejected Magwood's interpretation of §2244(b), recognizing that it "would permit every defendant who succeeds in having any component of his sentence modified to . . . rais[e] grounds that were either available for presentation on the first petition or even specifically rejected on that petition." Pet. App. 14a. Joining its sister circuits, the court of appeals interpreted §2244(b) to bar claims that either were, or could have been,

raised in the first habeas petition, while allowing claims that are novel to resentencing. Pet. App. 15a. Magwood's fair-warning claim was thus barred under §2244(b)(2) because Magwood could have raised the claim in his first federal habeas petition but did not. The court of appeals correctly interpreted §2244(b). Its decision should be affirmed.

STATEMENT OF THE CASE

A. THE MURDER OF SHERIFF NEIL GRANTHAM

Billy Joe Magwood was convicted of possessing illegal narcotics in February 1975 and was sentenced to four years' imprisonment. Magwood openly begrudged his jailors, especially Coffee County Sheriff Neil Grantham. Magwood complained to fellow inmate Billy Ray Cooper on multiple occasions that "he was being held without any reason," and that he would "get even and kill that S.O.B.," Sheriff Grantham. *Magwood v. State*, 426 So. 2d 918, 920 (Ala. Crim. App. 1982). Magwood informed fellow inmate James Kenneth Holder that "he didn't belong there, and that he was going to get even one way or the other." *Id.* Shortly after his release, he did.

On the morning of March 1, 1979, Magwood lay in wait for Sheriff Grantham in the Coffee County Jail parking lot. When Sheriff Grantham arrived for work, Magwood got out of his car and confronted Sheriff Grantham. Magwood shot the sheriff three times, once each in the head, face, and chest. He then fled. As Magwood sped away, he exchanged gunfire with Deputy Thomas Weeks, who witnessed the murder. Magwood was arrested and charged

with the capital offense of intentionally murdering a sheriff. Ala. Code §13-11-2 (1975) (repealed 1981).[1]

B. Alabama's Death Penalty Law

This case presents a purely procedural question. The merits of Magwood's fair-warning claim are not before the Court. *See* Pet. i. Nor can Magwood challenge his death-penalty eligibility, a purely state law issue, in this federal court. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Nevertheless, Magwood repeatedly asserts that murdering a sheriff was "an act that was not a death-eligible offense under Alabama law when he committed it" in 1978. Blue Br. 3 (*see also* Blue Br. 5-8, 10-12). Respondents disagree. More importantly, so have Alabama's highest courts, which ruled against Magwood on this state law issue. *See infra* at 9, 12-13. For the Court's benefit, we explain why.

Murdering a sheriff has always been a crime punishable by death in Alabama. *See Beck v. State*, 396 So. 2d 645, 649-52 (Ala. 1980). In fact, until 1975, Alabama law provided that the intentional murder of *any* human was punishable by death. *Id.*

In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Alabama Legislature rewrote Alabama's death penalty statute in 1975 to limit the number of homicide offenses that were eligible for the death penalty. The 1975 Code contained two lists of

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[1]Unless otherwise stated, all citations to the Alabama Code refer to the 1975 Code under which Magwood was prosecuted.

aggravating circumstances; one in §13-11-2, the other in §13-11-6. Section 13-11-2 was captioned: "Aggravated offenses for which death penalty to be imposed." Contained within §13-11-2 were 14 "aggravated circumstances," that rendered a person eligible for the death penalty when conjoined with an intentional murder. Ala. Code §§13-11-1, 13-11-2. Murdering a sheriff was on this list of aggravating circumstances. Ala. Code §13-11-2(a)(5).

Believing *Furman* required it, the 1975 Alabama Legislature mandated that the jury "shall fix the punishment at death" if the jury determined that the defendant was guilty of intentional murder plus one of the §13-11-2 aggravated circumstances. Ala. Code §13-11-2.[2] The legislature vested the trial court with the discretion to either follow, or disagree with, the jury's mandatory death sentence. Ala. Code §13-11-4. If the court accepted the jury's mandatory death sentence, the court was required to enter a written order that contained, among other things, "one or more of the aggravating circumstances enumerated in 13-11-6"—*i.e.*, the second list of aggravating circumstances. *Id.* No language, however, expressly denied the court the ability to consider a §13-11-2 aggravating circumstance.

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[2]The Alabama Supreme Court later ruled that the jury's sentencing decision must be discretionary and that the jury must be allowed to consider both aggravating and mitigating circumstances. *See Beck v. State*, 396 So. 2d 645, 663 (1980). Magwood's jury was afforded this discretion after a sentencing hearing.

The Alabama Supreme Court twice addressed the statute's two lists of aggravating circumstances. In *Beck v. State*, 396 So. 2d 645 (1980), the supreme court stated that "[t]he jury verdict that the defendant was guilty of committing the capital offense would mean that the State had already established at least one aggravating circumstance." *Id.* at 663. "In addition, the State would be permitted to offer evidence of any other aggravating circumstance contained in §13-11-6." *Id.* In *Kyzer v. State*, 399 So. 2d 330 (1981), the supreme court stated that it would be "completely illogical and would mean the legislature did a completely useless act" if a §13-11-2 aggravating circumstance mandated that the jury sentence the defendant to death, but then could not be considered by the trial court in its sentencing determination. *Id.* at 337. Accordingly, the supreme court stated that "[i]t is apparent that the legislature intended to permit the trial judge to find the same 'aggravated circumstances enumerated in § 13-11-2.' Code 1975, § 13-11-1. We so hold."[3] *Id.* at 338.

Later that year (1981), the state legislature re-wrote Alabama's death penalty statute. Relevant here, the legislature erased the terms "aggravated circumstance" and "aggravated offense" from §13-11-1 and §13-11-2 and "confin[ed] use of the concept of aggravation to the sentencing factors listed in section

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[3]Four years before the *Beck* and *Kyzer* decisions, and two years before Magwood murdered Sheriff Grantham, this Court upheld Texas' use of its capital offense list as statutory aggravating circumstances. *See Jurek v. Texas*, 428 U.S. 262, 268-74 (1976).

11 of the new act [formerly §13-11-6]." Ed Carnes, *Alabama's 1981 Capital Punishment Statute*, 42 Ala. Lawyer 456, 460 (1981). As reported by then-Assistant Attorney General (now Circuit Judge) Ed Carnes, this deletion was intentional, *id.* at 459-60, as was new language that prescribed that "no defendant may be sentenced to death unless at least one section 11 aggravating circumstance exists." *Id.* at 483; *see* Ala. Code §13A-5-45(f) (2006) (confining the use of "aggravating circumstances" to one section). In other words, the legislature changed Alabama's death penalty law in 1981 by confining all aggravating circumstances to one subsection: "In this regard, the new act differs from the 1975 statute as interpreted in *Kyzer v. State*." Carnes, *supra*, at 483.[4]

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[4]Magwood contends that *Ex parte Stephens*, 982 So. 2d 1148, 1153 (Ala. 2006), proves that murdering a sheriff "had never been a death-eligible offense" under former §13-11-2(a)(5). Blue Br. 11-12. *Stephens*, however, addressed the error of instructing a jury to consider the capital offense as an aggravating circumstance under *modern* (post-1981) Alabama law. When the *Stephens* court stated that its dicta in *Kyzer* "was incorrect," it was applying *Kyzer* to the post-1981 language that confined aggravating circumstances to one statutory list: "Section 13A-5-49, Ala. Code 1975, states that '[a]ggravating circumstances shall be the following.' The language 'shall be'-as opposed to 'shall include'-indicates that the list is intended to be exclusive." *Stephens*, *supra*, at 1153. Again, that exclusivity language was added in 1981, *see* Carnes, *supra*, at 460, three years after Magwood murdered Sheriff Grantham. Furthermore, regardless of what date *Stephens* appeared in the Southern Reporter, *see* Blue Br. 11, n.7, *Stephens* was decided and released more than a year before briefing in the circuit court, yet Magwood never cited it. Nor has Magwood claimed to the State courts that *Stephens* repudiated their decisions affirming his death sentence. *See infra* at 9, 12-13.

C. MAGWOOD'S TRIAL

Magwood was prosecuted under the 1975 Code in June 1981. During the guilt phase, Magwood argued that he was not guilty by reason of insanity. The jury rejected Magwood's insanity defense and found him guilty of capital murder.

A separate penalty-phase hearing was held before the jury. The jury's guilt-phase verdict necessarily proved the aggravating circumstance of murdering a sheriff. Ala. Code §13-11-2(a)(5). Relying on a penalty-phase witness and the four experts who testified regarding Magwood's sanity during the guilt phase, Magwood argued in mitigation that he did not have previous violent tendencies, nor did he understand the consequences of his actions when he murdered Sheriff Grantham. (1983-R: Doc. 38, Exh. A at 348-50.)[5]

The jury unanimously sentenced Magwood to death. The trial court agreed. Based on the jury's rejection of Magwood's insanity defense, the trial court rejected the statutory mitigating circumstances of "extreme mental or emotional disturbance" and "the capacity of the defendant to appreciate the criminality of his conduct." *Magwood*, 426 So. 2d at 928 (referring to Ala. Code §13-11-7(2), (6)). The trial court determined that death was the appropriate sentence because the aggravating

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[5]The Court has two records before it: (1) the record stemming from Magwood's 1983 petition and (2) the record stemming from Magwood's 1997 petitions. Respondents cite first to the relevant record, then its docket entry.

circumstance of murdering a sheriff outweighed the two mitigating circumstances of Magwood's age (27) and his lack of a prior violent criminal history. *Id.*

D. STATE APPEALS: ROUND 1

1. *Direct Appeal*: Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Magwood's conviction and death sentence on direct appeal. *See Magwood*, 426 So. 2d at 928; *Ex parte Magwood*, 426 So. 2d 929 (Ala. 1983). Regarding Magwood's sentence, the state supreme court held that "the trial court properly considered any aggravating and mitigating circumstances prior to imposing the death penalty." *Magwood*, 426 So. 2d at 932. This Court denied certiorari review. *See Magwood v. Alabama*, 462 U.S. 1124 (1983).

2. State Post-Conviction: Nine days before his scheduled execution, Magwood filed a state post-conviction petition. In that petition, Magwood challenged, among other things, his competency to be executed and the effectiveness of his trial counsel. (1983-R: Doc. 38, Ex. O at 170-76.) After an evidentiary hearing, the trial court found that Magwood was sane and denied Magwood's petition on all grounds. *Id.* at 178-80. The Alabama Court of Criminal Appeals affirmed. *See Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). The state supreme court denied review. *See Ex parte Magwood*, 453 So. 2d 1349 (Ala. 1984).

Magwood did not challenge his eligibility for the death penalty under state law at trial, on direct appeal, or in his post-conviction proceedings. Nor

did Magwood allege under federal law that he lacked fair warning that he could receive the death penalty for murdering a sheriff.

E. Federal Habeas Proceedings: Round 1

1. *District Court*: As Magwood litigated his state post-conviction petition, he simultaneously filed his first §2254 habeas petition ("1983 Petition") and a motion to stay his execution. The district court granted Magwood's motion for a stay and held his petition in abeyance until the state courts finalized their post-conviction review. *See Magwood v. Smith*, 608 F. Supp. 218, 219-20 (M.D. Ala. 1985). Citing our desire that "piecemeal litigation of claims and issues be avoided," Respondents requested an "order compelling [Magwood] to present all conceivable claims and issues under penalty of having them barred from future proceedings if he fails to present them now." App. 6a. The district court granted our request and ordered Magwood "to present all possible grounds for habeas corpus relief." App. 12a. In a motion for additional time, Magwood acknowledged the court's order and gave his "unqualified promise" to "present every issue he can conceive" in the 1983 Petition. (1983-R: Doc. 77 at 2.)

Magwood ultimately raised nine grounds for relief in the 1983 Petition, none of which challenged his eligibility for the death penalty or the warning he received regarding his death-penalty eligibility. *See Magwood*, 608 F. Supp. at 220. After ordering its own mental evaluation, the district court found that Magwood was sane. *Id.* at 219-20, 224. The court

granted habeas relief, however, finding that, even though Magwood was sane, the state trial court erred when it rejected the statutory mitigating circumstances regarding Magwood's mental condition and his capacity to understand the criminality of his conduct. *Id.* at 224-28. Accordingly, the district court "remanded to the state trial court for resentencing based upon the existence of these four mitigating circumstances (§ 13-11-7(1), (2), (6), and (7)), rather than just the two originally considered." *Id.* at 228.

2. *Circuit Court*: Treating the district court's remand order as a "conditional writ of habeas corpus," the court of appeals affirmed. *See Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). To comply with the conditional writ, the circuit court ordered the state trial court to conduct a "new sentencing hearing," *id.*, but went on to note that "we do not imply or suggest that the state trial court may not sentence Magwood to death after weighing the four mitigating factors against the aggravating circumstances." *Id.* at 1450. Regarding the unchallenged aggravating circumstance, the circuit court noted that "Ala. Code §13-11-2(a)(5) permits the imposition of the death penalty for 'the murder of any . . . sheriff.'" *Id.* at 1441, n.4.

F. Resentencing and State Appeals: Round 2

1. *Resentencing*: In compliance with the conditional writ, the state trial court conducted a hearing in September 1986 to "resentence Magwood in light of two now-established mitigating factors concerning Magwood's mental condition." Pet. App.

103a. Weighing four mitigating factors against the original aggravating factor, the court determined that "the aggravating circumstance of the intentional murder of Sheriff Neil Grantham outweighs all mitigating circumstances." Pet. App. 106a. Accordingly, the trial court again sentenced Magwood to death. *Id.*

Magwood did not challenge his eligibility for the death penalty, or his warning of that eligibility, at resentencing. To the contrary, Magwood acknowledged that "the capital offense itself is an aggravating circumstance and that this court has every right to consider it as an aggravating circumstance." (1997-R: Doc. 17, Tab #R-1 at 17-18.)

2. *Direct Appeal*: Magwood did not challenge his death-penalty eligibility, or his warning of that eligibility, to either state court on direct appeal. Nevertheless, as required by Alabama law, the Alabama Court of Criminal Appeals "review[ed] the propriety of the death sentence." *Magwood v. State*, 548 So. 2d 512, 513 (Ala. Crim. App. 1988). In finding that death was the appropriate sentence, the court noted that the murder of a sheriff was (1) "on its face a capital offense" under the 1975 Code, (2) a "statutory aggravating circumstance, as allowed by *Ex parte Kyzer*," and (3) a crime for which "the death penalty is generally imposed throughout the state." *Id.* The Alabama Supreme Court affirmed. *Ex parte Magwood*, 548 So. 2d 516 (Ala. 1988).

Eight years after his trial, Magwood first challenged his death-penalty eligibility under

Alabama law, and his warning of that eligibility under the federal due process clause, in his petition for a writ of certiorari to this Court. (1997-R: Doc. 17, Tab #R-6 at 11-18.) This Court denied certiorari review. *Magwood v. Alabama*, 493 U.S. 923 (1989).

3. *Post-Conviction*: Magwood filed a state post-conviction petition in June 1990, which he amended seven times over the next two years. The parties disagree on whether Magwood fairly presented a federal due process "fair-warning" claim to the state courts (Magwood's view), as opposed to a challenge against his eligibility for the death penalty under Alabama law (Respondents' view). That argument is not before the Court.

Relevant here, the state trial court held that Magwood's claim of an "illegal death sentence" was meritless, as well as procedurally barred under Alabama law because the claim was available at Magwood's 1981 trial. *Magwood v. State*, 689 So. 2d 959, 976-77, 984 (Ala. Crim. App. 1996). The Alabama Court of Criminal Appeals affirmed. *Id.* at 964-66. That court noted that Magwood's various attacks on his sentence were subject to state law preclusion because they were available at the 1981 trial. *Id.* at 964-65. The court then noted that using the murder of a sheriff as an aggravating circumstance was an "issue [it had] previously decided adversely to [Magwood]" on direct appeal from resentencing. *Id.* at 965. Both the Alabama Supreme Court and this Court denied certiorari review.

G. Federal Habeas Proceedings: Round 2

1. *District Court*: Magwood simultaneously filed two §2254 petitions on April 23, 1997: one purporting to attack his 1981 conviction, the other purporting to attack his 1986 resentence. Pet. App. 28a. Pursuant to 28 U.S.C. §2244(b)(3), Magwood requested that the circuit court authorize the district court to consider the petition purporting to attack his 1981 conviction. *See In re Magwood*, 113 F.3d 1544 (11th Cir. 1997). The circuit court denied authorization. *Id.* at 1553.

Magwood did not seek authorization to pursue the claims presented in the petition purporting to attack his 1986 resentence ("1997 Petition"). Ten years after Magwood filed the 1997 Petition, the district court granted habeas relief on Magwood's fair-warning claim and his corresponding ineffective assistance of counsel claim.[6] Pet. App. 44a-72a, 82a-89a. Relevant here, the district court noted that, even though Magwood could have raised his fair-warning claim in his 1983 Petition, the claim was not barred as successive under §2244(b)(2) because "the habeas petition on resentencing challenges a different judgment." Pet. App. 65a.

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[6]Respondents unsuccessfully sought a petition for writ of mandamus directing the district court to rule in 2006. (1997-R: Doc. 101.) One year later, Respondents notified the district court that it again would seek mandamus relief if the court did not rule promptly. (1997-R: Doc. 111.) The court granted the writ three months later. (1997-R: Doc. 116.)

2. *Circuit Court*: The Court of Appeals for the Eleventh Circuit reversed. The court unanimously held that Magwood's fair-warning claim was successive under §2244(b)(2).[7] Pet. App. 10a-16a. The court adopted the Second Circuit's reading of §2244(b) that a numerically second petition would be considered a "'first' petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a 'second' petition to the extent that it challenges . . . any component of the original sentence that was not amended." Pet. App. 15a (*quoting Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997)). The court held that Magwood's fair-warning claim was barred under §2244(b) because the claim "was available at his original sentencing" and the claim did not meet either of §2244(b)(2)'s exceptions. *Id.* The court addressed the merits of all claims that originated at Magwood's 1986 resentencing, and in so doing, reversed the district court's finding of ineffective assistance of counsel for failing to raise the fair-warning claim. Pet. App. 16a-22a.

This Court limited certiorari review to the first question raised in Magwood's petition: Did the court of appeals correctly determine that §2244(b)(2) bars review of Magwood's fair-warning claim?

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[7]The circuit court did not address Respondents' additional arguments that Magwood's fair-warning claim was meritless and procedurally defaulted. Pet. App. 6a, n.2.

SUMMARY OF THE ARGUMENT

Federal habeas petitioners are entitled to one, but only one, full and fair opportunity to litigate a claim. When that opportunity ends, the door to habeas review closes. Future attempts to raise a claim that could have been adjudicated in a previous petition are barred as an abuse of the writ. Magwood's fair-warning claim is a classic abuse of the writ via inexcusable neglect. Magwood could have, but did not, raise the claim in his 1983 Petition. That petition was adjudicated in 1986. Thus, Magwood's attempt to litigate the same claim in his 1997 Petition is barred by §2244(b)(2), AEDPA's version of the abuse of the writ doctrine.

Of course, this case presents a wrinkle. Magwood's 1983 Petition achieved limited relief: a resentencing hearing to add two mitigating circumstances to Magwood's sentencing calculus. Section 2244(b)'s plain language does not account for resentencing. It would bar all claims in a numerically "second or successive" petition, even claims novel to the resentencing hearing, absent one of §2244(b)(2)'s exceptions for newly discovered facts or law. Accordingly, in line with its most recent §2244(b) decision, the Court must find an interpretation of §2244(b) that (1) is consistent with its abuse of the writ precedent, which §2244(b)(2) tightened, (2) achieves AEDPA's goals of "comity, finality, and federalism," and (3) avoids "troublesome results." *Panetti v. Quarterman*, 551 U.S. 930, 944-46 (2007) (citations omitted). The Court should

adopt the interpretation applied by the circuits for more than a decade.

1. When faced with a numerically second or successive habeas petition arising after resentencing, the prevailing rule is to focus on the nature of the pleaded claims. If a claim could have been, or was, raised in a prior habeas petition, it is barred by §2244(b)(2) and §2244(b)(1) respectively. If a claim is novel to resentencing, and therefore could not have been raised in a prior habeas petition, it is not barred by §2244(b).

The prevailing rule properly balances competing interests. Limiting preclusion to claims that could have been, or were, previously adjudicated in federal court vindicates AEDPA's goals of "comity, finality, and federalism" *id.* at 945, while avoiding the "troublesome result" of denying a petitioner his one opportunity to adjudicate freshly ripened claims. *Id.* at 946. The prevailing rule also aligns with the Court's historic abuse of the writ and successive petition doctrines, both of which have turned on a habeas petitioner's opportunity to adjudicate claims in a previous petition.

2. Magwood asks the Court to focus solely on the number of paper petitions challenging "the same judgment." But the term "judgment" is foreign to §2244(b)'s text, and Magwood's approach fails each interpretive guideline this Court espoused in *Panetti*. Magwood's "new judgment" theory emasculates §2244(b)(1) and §2244(b)(2) after resentencing, thereby resurrecting all habeas claims that could

have been, or even were, adjudicated in a previous petition. This resurrection result is so "troublesome," *id.* at 946, that Magwood retreats from his own "new judgment" theory by carving a distinction between convictions and sentence that conflicts with the Court's precedent and the realities of capital litigation. Magwood's theory also flouts AEDPA's goals of "comity, federalism, and finality," *id.* at 945, by thrusting States into a second round of federal habeas litigation over claims that could have been, or were, previously adjudicated. And his theory is historically inaccurate, as the abuse of the writ and successive petition doctrines stem from habeas proceedings that did not challenge a judgment of conviction and sentence. Finally, allowing Magwood to adjudicate his abusive claim creates a "procedural anomal[y]," *id.* at 946, when Magwood is compared to six petitioners whose habeas claims this Court barred because they abused the writ in a similar manner. *See Wong Doo v. United States*, 265 U.S. 239 (1924); *Antone v. Dugger*, 465 U.S. 200 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984); *Delo v. Stokes*, 495 U.S. 320 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Burton v. Stewart*, 549 U.S. 147 (2007).

3. The Court can affirm by applying either (a) §2244(b)(2)'s plain language or (b) the prevailing circuit rule. Both methods dictate affirmance because each focuses on whether Magwood had an opportunity to raise his fair-warning claim in his 1983 Petition, and Magwood acknowledges that he did in the question presented.

ARGUMENT

SECTION 2244(b)(2) BARS REVIEW OF MAGWOOD'S FAIR-WARNING CLAIM.

Magwood knew the consequences of his failure to raise all available claims in his 1983 Petition. In September 1983, Respondents requested an "order compelling [Magwood] to present all conceivable claims and issues" in his 1983 Petition, "under penalty of having them barred from future proceedings if he fails to present them now." App. 6a. The district court granted our request, *see* App. 12a, and the federal courts adjudicated every claim that Magwood presented in his 1983 Petition. *See Magwood v. Smith*, 791 F.2d 1438 (1986). Those proceedings concluded with one limited command: Reweigh the same aggravating circumstance against four mitigating circumstances, not two. *Id.* at 1450.

At that point, 24 years ago, Respondents were "entitled to the assurance of finality" on every other issue that ripened during Magwood's 1981 trial, issues such as the validity of Magwood's conviction and his eligibility for the death penalty. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Having once borne the "significant costs of federal habeas review," both Respondents and Sheriff Grantham's family possessed a "compelling" interest not to spend 13 additional years (1997-2010) traveling from federal district court, to circuit court, to this Court, litigating issues that achieved closure in 1986. *Id.* Federalism and comity demanded that, if Respondents were required to return to federal court, the only issues for

debate would be novel to the 1986 resentencing. *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("[I]f reexamination of a conviction in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.").

Magwood's attempt to revive a claim that ripened in 1981, then soured in 1986, not only tramples our vested interest in finality, it defies 86 years of habeas doctrine. Since their inception, the "abuse of the writ" and "successive petition" doctrines have embodied one overarching principle: A petitioner gets one, but only one, opportunity to litigate a habeas claim. AEDPA strengthened this principle by making its application mandatory and swift. *See* 28 U.S.C. §2244(b); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Whether through §2244(b) or the abuse of the writ doctrine, this Court has applied the "one opportunity" principle on six occasions to hold that a claim raised in a numerically second or successive habeas petition was barred when the claim could have been, but was not, raised in a previously adjudicated petition. *See Wong Doo v. United States*, 265 U.S. 239 (1924); *Antone v. Dugger*, 465 U.S. 200 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Delo v. Stokes*, 495 U.S. 320 (1991); *McCleskey*, *supra*; *Burton v. Stewart*, 549 U.S. 147 (2007). Magwood belongs on this list because he abused the writ in the same manner: He failed to raise a fair-warning claim in his 1983 Petition; that

petition was adjudicated in 1986; and, he now raises a fair-warning claim in his subsequent 1997 Petition.

Simply put, the door closed on Magwood's fair-warning claim when his first petition was adjudicated in 1986, just as the door closed on similar claims for the petitioners in *Wong Doo*, *Antone*, *Woodard*, *Delo*, *McCleskey*, and *Burton* when their first petitions were adjudicated. AEDPA serves as the door's lock, not its key.

A. SECTION 2244(b) FOCUSES ON THE PRIOR OPPORTUNITY TO RAISE CLAIMS.

The Court can apply §2244(b)(2) to Magwood's 1997 Petition in one of two ways: (1) by its plain language or (2) by treating the term "second or successive" as a "term of art given substance in [the Court's] prior habeas corpus cases." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). Both methods dictate preclusion of Magwood's fair-warning claim because both inquiries hinge on Magwood's opportunity to raise the claim in his 1983 Petition. Respondents separate the two methods, however, because applying §2244(b)'s plain language to *all* claims in a post-resentencing petition leads to a dubious result.

1. Absent its exception for newly discovered facts or law, which do not apply here, §2244(b) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed[.]

28 U.S.C. §2244(b)(1), (2) (exceptions omitted). Read plainly, §2244(b)(2) divests federal courts of jurisdiction over Magwood's fair-warning claim because (1) Magwood did not present the claim in his "prior application" (*i.e.* the 1983 Petition); (2) Magwood "presented" the claim in his numerically "second or successive habeas corpus application" (*i.e.* the 1997 Petition); and (3) neither of §2244(b)(2)'s exceptions for new facts or new law applies. Thus, §2244(b)(2) mandates that Magwood's fair-warning claim "shall be dismissed." *Id.* At this point, Respondents would normally argue that AEDPA's plain language ends the matter because federal courts derive their "power to award the writ" of habeas corpus solely from "written law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

But we acknowledge a problem. Reading §2244(b) plainly against numerically second petitions that arise after resentencing would bar claims that first ripen at resentencing (unless the claim met one of §2244(b)(2)'s exceptions), and the Court has held that "the statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought

in an application filed when the claim is first ripe." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Accordingly, while AEDPA's plain language mandates affirmance here, Respondents follow the Court's lead in *Slack*, *Martinez-Villareal*, and *Panetti* by addressing the phrase "second or successive" as a term of art describing the historic successive petition and abuse of the writ doctrines.[8]

2. If the Court looks beyond §2244(b)'s plain language, the debate centers on how the Court applies the term "second or successive": by counting paper "applications" or judging the prior opportunity to raise "claims." Magwood argues that, even though the Court is not applying §2244(b)'s plain text, it must maintain strict allegiance to the phrase "second or successive habeas corpus application" and count the number of paper applications against "the same judgment." Blue Br. 13. In other words, Magwood argues that §2244(b)(2) should be judicially appended to read:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application [*against the same judgment*] shall be dismissed unless –

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[8]To be clear, this case does not involve a *Panetti*/*Martinez-Villareal* "first ripe" issue. The lower courts adjudicated the merits of Magwood's claims that originated at resentencing, Pet. App. 16a-22a, and the question presented acknowledges that Magwood could have raised his fair-warning claim in his 1983 Petition. Pet. i. Therefore, affirmance on §2244(b)(2)'s plain language is consistent with the Court's precedent.

Under Magwood's theory, if a numerically second petition does not attack "the same judgment," the fact that a pleaded claim was, or could have been, adjudicated in the previous petition is irrelevant under §2244(b). Blue Br. 18.

Respondents believe that the Court should instead focus on the claims pleaded in a numerically second petition; specifically, the opportunity to raise the claims in a previous petition. A claim-focused approach is correct for two reasons.

First, §2244(b) is a claim-focused statute. Claims, not applications, are barred by §2244(b). *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) (citing §2244(b) to support the statement that "[o]nly individual *claims*, and not the application containing those claims, can be procedurally defaulted"). As the Court noted in *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), "the 'requirements' of the subsection [§2244(b)] are not applicable to the application as a whole; instead, they require inquiry into specific 'claim[s]'." Furthermore, focusing on claims when applying the successive petition bar comports with similar claim-focused applications of AEDPA. For example, courts judge exhaustion by focusing on the exhaustion of individual claims in the state courts, despite §2254(b)'s text referring to preclusion of the paper "application for a writ of habeas corpus." Claim-focused review also guides the procedural default rule, a defense similar in structure and purpose to the successive petition bar. *See McCleskey*, *supra*, at 493.

Second, the Court applies the claim-focused approach. In *Panetti*, the Court's most recent §2244(b) case, the Court was faced with the same question: how to apply the phrase "second or successive" to a numerically second petition that raised a newly-ripened claim. The Court dove into Panetti's numerical second petition to judge the nature of his claim, concluding that "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford claim* brought in an application when the *claim* is first ripe." *Panetti*, *supra*, at 947 (emphasis added). . Panetti's prior opportunity to litigate his individual claim drove the Court's extra-textual inquiry. The same should be true here.

In determining that Panetti's newly ripened claim was not barred as "second or successive," the Court considered several guidelines: (1) the Court's abuse of the writ precedent, (2) AEDPA's goals of "comity, finality, and federalism," and (3) the avoidance of "troublesome results" and "procedural anomalies." 551 U.S. at 944-46. In Part B, we demonstrate how a claim-focused approach comports with each of these factors. In Part C, we show that Magwood's theory conflicts with them all.

B. The Prevailing "One Opportunity" Rule Properly Applies §2244(b) To Post-Resentencing Petitions.

Respondents dub the claim-focused reading of §2244(b) the "one opportunity" rule after Judge Easterbrook's encapsulation of AEDPA's underlying principle: "[T]he idea behind the rules in §2244(b)

and §2255[h] is that a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack." *Beyer v. Litscher*, 306 F.3d 504, 508 (7th Cir. 2002) (brackets omitted).

As its name indicates, the "one opportunity" rule focuses on a petitioner's prior opportunity to litigate his claim(s) in a prior habeas petition. If resentencing occurs between successive habeas petitions, §2244(b) applies accordingly: Any claim in a numerically second or successive petition that could have been, or was, adjudicated in a previous habeas petition is barred, unless it meets one of §2244(b)(2)'s exceptions. Any claim in a numerically second or successive petition that is novel to the resentencing, and therefore could not have been raised in a previous petition, is not barred. If the numerically second petition is "mixed" because it contains at least one successive or abusive claim, then the petition is transferred to the circuit court for authorization under §2244(b)(3). *See* Vol. 28 *Moore's Federal Practice*, §671.10[2][b] (Matthew Bender 3d ed.) (outlining the various transfer rules for petitions that contain "both claims that are successive" and "other claims that could be filed directly in the district court").

By focusing on the prior opportunity to raise a claim, the "one opportunity" rule balances competing interests. The preclusion of claims that either were, or could have been, adjudicated in a previous petition vindicates the States' and victims' interests in finality. Allowing claims novel to resentencing to proceed upholds a petitioner's "one opportunity" to

litigate freshly ripened claims, as mandated by *Martinez-Villareal* and *Panetti*.

1. The Circuits Have Applied The "One Opportunity" Rule To Post-Resentencing Habeas Petitions For More Than A Decade.

Before running *Panetti's* interpretive gauntlet, Respondents dispel Magwood's assertion that the Eleventh Circuit's application of the "one opportunity" rule is somehow "unprecedented, so there is no body of law that illustrates its implications." Blue Br. 28. In addition to the Eleventh Circuit, Respondents have identified six circuit courts that have applied the "one opportunity" rule to post-resentencing §2254 petitions and §2255 motions since AEDPA took effect in 1996: [9]

- *First Circuit*: After vacating the petitioner's original judgment, which resulted in resentencing, the circuit court held that the petitioner's post-resentencing §2255 motion was barred as a "second petition as AEDPA uses that term" because it raised an ineffective assistance of counsel claim that could have been raised in the first petition. *See Pratt v. United States*, 129 F.3d 54, 63 (1st Cir. 1997).

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[9]The "second or successive" inquiry applies equally to §2255 motions filed by federal prisoners. *See* 28 U.S.C. §2255(h) (requiring authorization of a "second or successive motion" under §2244(b)).

• *Second Circuit*: After the petitioner's first §2255 motion resulted in a reduction of his sentence, the circuit court held that the petitioner's post-resentencing §2255 motion was barred because it raised previously available challenges to "the conviction or the unamended components of his sentence." *Galtieri v. United States*, 128 F.3d 33, 38 (2d Cir. 1997). Later that year, the circuit court allowed a similar post-resentencing §2255 motion that "[sought] to vacate [the petitioner's] new sentence on grounds opened by the resentencing." *Esposito v. United States*, 135 F.3d 111, 113-14 (2d Cir. 1997).[10]

• *Fourth Circuit*: After a petitioner was resentenced because one of his underlying convictions was vacated, the circuit court held that his post-resentencing §2255 motion was not "second or successive" because the motion "[sought] to raise only those issues that originated at the time of resentencing" and it was the petitioner's "first opportunity to assert new issues which arose during his resentencing hearings." *In re Taylor*, 171 F.3d 185, 187-88 (4th Cir. 1999).

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[10]Magwood relies on *Esposito* as the post-AEDPA case creating a circuit split, *see* Pet. 14-15; Pet. Reply Br. 4-5, Blue Br. 28, n.11, despite *Esposito's* express acknowledgment that "[n]ot every habeas petition that attacks a new and amended judgment is saved from AEDPA's bar on 'second or successive' petitions." *Esposito*, *supra*, at 113. Magwood claims the Second Circuit's decisions turned on an "amended" versus "new" sentence distinction. Blue Br. 28, n.11. This alleged distinction is refuted by the numerous cases cited *infra* at 27-30 that applied the prevailing "one opportunity" rule after the original sentence was vacated and a new judgment entered.

- *Fifth Circuit*: After the petitioner's first §2255 motion resulted in his judgment being re-entered to perfect an out-of-time appeal, the petitioner filed a second habeas petition attacking the effectiveness of trial counsel and new appellate counsel. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 863-64 (5th Cir. 2000). The circuit court held that the IAC claims against trial counsel were "second or successive" because they could have been raised in the first petition. *Id.* at 869. The court held that the IAC claims against appellate counsel were not "second or successive" because they could not have been raised in the first petition. *Id.*

- *Sixth Circuit*: After a §2255 petitioner was resentenced because one of his underlying convictions was vacated, the petitioner filed a second §2255 motion raising only issues that originated at resentencing. *Lang v. United States*, 474 F.3d 348, 350 (6th Cir. 2007). The circuit court held that the claims were not "second or successive," agreeing with its "sister circuits that, where a claim originates at resentencing and could not have been challenged at the original sentencing proceeding, the first §2255 motion challenging that claim is not a 'second or successive' motion." *Id.* at 353.

- *Seventh Circuit*: In *Walker v. Roth*, 133 F.3d 454 (7th Cir. 1997), a §2254 petitioner was resentenced after the district court held that his original sentencing violated due process. The circuit court permitted his second §2254 petition because it solely "challenge[d] aspects of his resentencing." *Id.* at 455. Later, in *Dahler v. United States*, 259 F.3d

763 (7th Cir. 2001) (Easterbrook, J.), the petitioner was resentenced after his first §2255 motion resulted in his original sentence being vacated. Much like Magwood, Dahler argued in his next petition that he was not eligible for recidivist sentencing because the jury had not made that determination. The court held that Dahler's post-resentencing *Apprendi* claim was barred because "the contention he now advances . . . is not something that was introduced by his resentencing in 1998." *Id.* at 764. "The choice between judge and jury . . . was one made in 1995, and nothing changed between the sentencing in 1995 and the resentencing in 1998." *Id.*

Like the Eleventh Circuit here, every circuit court dealing with a numerically second petition that arose after resentencing opened the petition to judge the nature of the claims inside.[11] If a claim could have been, or was, raised in the first petition, it was barred as "second or successive." If a claim originated at resentencing, it was not. *See Dahler*, *supra*, at 765 (noting that, by 2001, the "distinction between challenges to events that are novel to resentencing," and "events that predated the sentencing," had "been adopted by every other circuit that [had] considered the subject"); *see also* 7 W. LaFave, *Criminal Procedure*, §28.9(b), p.294 (3d ed. 2007) ("The bar on successive petitions does not

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[11] In an unpublished opinion, the Tenth Circuit has also applied the "one opportunity" rule to bar "three issues [that] could have been raised in [the petitioner's] first §2255 motion," which led to resentencing. *See United States v. Verners*, 49 Fed. Appx. 803, 804-05 (10th Cir. 2002).

apply to a prisoner who is resentenced after filing his first application for relief, and raises only claims that originated at resentencing in his second application"); *Moore's Federal Practice*, *supra*, at §671.10[2][b] ("a second petition following a successful first petition should be treated as a first petition, at least with respect to issues that could not have been raised previously").

Of course, Respondents do not contend that the "one opportunity" rule is correct because the circuits agree. As outlined below, the rule is correct because it meets each of the interpretive factors used by the Court in *Panetti*.

2. The "One Opportunity" Rule Flows From The Historic Abuse Of The Writ And Successive Petition Doctrines.

Like the prevailing "one opportunity" rule, the abuse of the writ and successive petition doctrines and their progeny, the phrase "second or successive," historically focused on a petitioner's prior opportunity to adjudicate claims. *See Panetti*, *supra*, at 943-44 ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA].")

Congress did not create the phrase "second or successive" from whole cloth in 1996. The phrase appeared in the 1948 version of §2255: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on

behalf of the same prisoner." 28 U.S.C. §2255 (1964 ed.). The Court first used the phrase "second or successive application" in 1963 to describe petitions that fell under its historic abuse of the writ and successive petition doctrines, *see Sanders v. United States*, 373 U.S. 1, 8 (1963), and the term "second or successive petition" still governed the abuse of the writ doctrine when Congress passed AEDPA in 1996. *See* 28 U.S.C. §2254(b) Rule 9(b) (1994 ed.). Accordingly, a proper understanding of the phrase "second or successive" is grounded in the Court's abuse of the writ and successive petition precedent. *See Slack*, *supra*, at 486-87 (stating that "second or successive" is a "term of art given substance in our prior habeas corpus cases").

1. Magwood bases his historical argument on the assertion that the "abuse of the writ doctrine [was] designed to curb repetitive challenges to the *same* judgment." Blue Br. 13. But the Court certainly did not create the abuse of the writ doctrine to curb repetitive attacks on *state* judgments of conviction and sentence. The abuse of the writ doctrine was born in 1924, *see Salinger v. Loisel*, 265 U.S. 224 (1924); *Wong Doo* (1924), *supra*, nearly two decades before the Court first "allow[ed] a final judgment of conviction in a state court to be collaterally attacked on habeas." *Felker*, *supra*, 663 (citing *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (per curiam)).

In fact, the successive petition and abuse of the writ doctrines grew out of cases involving prisoners who were *not* attacking judgments of conviction and

sentence. The Court crafted the abuse of the writ doctrine in *Salinger*, which involved a habeas petitioner who was skipping states to avoid extradition, not attacking a judgment of conviction and sentence. *See Salinger*, *supra*, at 225-27 One month after releasing *Salinger*, the Court applied its newly minted rule against a petitioner seeking to avoid deportation, not attacking a judgment of conviction or sentence. *See Wong Doo*, *supra*, at 239.

In *Sanders*, *supra*, the Court set the ground rules for its successive petition and abuse of the writ doctrines. In the process, the Court first used the phrase "second or successive application," along with the terms "first," "second," and "subsequent" applications, to describe the petitions in *Salinger* and *Wong Doo*—again, petitions that attacked custody, but not judgments of conviction and sentence. *Sanders*, *supra*, at 8-10. Accordingly, Magwood's contention that the "abuse of the writ doctrine" and "second or successive concept" were "designed to curb repetitive challenges to the *same* judgment" is a historical fallacy. Blue Br. 13.

2. Instead, the abuse of the writ doctrine, and its progeny, "second or successive application," targeted numerically second (or later) petitions containing claims that could have been raised in earlier petitions. By 1996, the Court had found an abuse of the writ on five occasions. The Court held that Wong Doo's petition abused the writ because he raised a claim in his numerically second petition, even though he had "full opportunity to offer proof" of the same claim in his first habeas proceeding.

Wong Doo, *supra*, at 241. In *Woodard v. Hutchins*, 464 U.S. 377 (1984), the Court found that a second petition was abusive because it raised three claims that "could and should have been raised in [Hutchins'] first petition." *Id.* at 379. In *Antone v. Dugger*, 465 U.S. 200 (1984), the Court found an abuse of the writ when a second petition raised three claims not contained in the first petition. *Id.* at 964-65. In *Delo v. Stokes*, 495 U.S. 320 (1991), the Court found that a claim raised in a petitioner's fourth petition was abusive because the claim "could have been raised in his first petition for federal habeas corpus." *Id.* at 321-22. Finally, in *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court determined that the petitioner abused the writ by raising a claim in his second petition that he could have raised in his first. *Id.* at 497-503. In short, every finding of an abuse of the writ leading up to AEDPA's passage turned on the petitioner's prior opportunity to raise the claims pleaded in his numerically second or later petition, not on the petitioner's judgment status.

Five years before AEDPA's passage, the Court confirmed that "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *McCleskey*, *supra*, at 489. The Court's claim-focused, opportunity-driven definition of an abuse of the writ would have shaped Congress' understanding of the term "second or successive" in 1996. *See Slack*, *supra*, at 486 (stating that "we do not suggest the definition of second or successive

would be different under AEDPA" than under pre-AEDPA law).

The prevailing "one opportunity" rule aligns with the Court's pre-AEDPA definition of an abuse of the writ and the Court's pre-AEDPA application of the doctrine. Magwood's judgment-based reading of §2244(b), which resurrects previously available claims, does not. In fact, if Magwood is correct that current §2244(b) grants petitioners a second opportunity to raise the same claim, then AEDPA seemingly *relaxed* the contemporary abuse of the writ rule. *But see Felker*, *supra*, at 664 (noting that AEDPA added "new restrictions on successive petitions" and "further restricts the availability of relief to habeas petitioners").

3. The "One Opportunity" Rule Aligns With The Court's Post-AEDPA Precedent.

The Court's post-AEDPA precedent interpreting the phrase "second or successive" similarly turns on a petitioner's opportunity to litigate his claims in a previous habeas petition. The Court has applied §2244(b)'s "second or successive" language to numerically second habeas petitions four times since 1996.[12] We start with the cases in which the Court determined that §2244(b) did not bar habeas review.

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[12]Although both cases implicated §2244(b), Respondents do not address the post-AEDPA cases in which a motion did not count as a §2254 petition or §2255 motion. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005) (holding that a Rule 60(b) motion was not the equivalent of a §2254 petition); *Castro v. United*

1. In *Slack v. McDaniel*, 529 U.S. 473 (2000), Antonio Slack dismissed his first "mixed petition" without prejudice pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982), so that he could exhaust his remaining claims in state court.[13] The Court held that Slack's numerically second petition, which was filed after full exhaustion in the state courts, was not "second or successive." *Id.* at 486-87. Central to the Court's decision was that Slack's original mixed petition "[had] been dismissed . . . before the district court adjudicated any claims." *Id.* at 487.

In *Stewart v. Martinez-Villareal*, *supra*, Ramon Martinez-Villareal claimed in his 1993 Petition that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* claim was denied as premature, and the remainder of the 1993 Petition was denied. *Id.* at 640-41. After the State secured an execution date, Martinez-Villareal re-raised the claim in his 1997 Petition. *Id.* The Court held that the 1997 Petition was not "second or successive," as "[t]here was only one application for habeas relief [*i.e.* the 1993 Petition];" the district court was required to adjudicate Martinez-Villareal's *Ford* claim "at the time it became ripe;" and, "it [had] not been ripe for resolution until now." *Id.* at 643.

States, 540 U.S. 375 (2003) (rejecting the recharacterization of a Rule 33 motion for new trial as a §2255 motion).

[13] *Slack* arose before AEDPA; accordingly, the Court applied Rule 9(b) and its decision in *McCleskey*. *Slack*, *supra*, at 485-86. Because Rule 9(b) also used the term "second or successive," the pre-AEDPA distinction is not relevant here.

The ripeness of a *Ford* claim similarly drove *Panetti*, 551 U.S. 930. Unlike Martinez-Villareal, Louis Panetti did not raise his *Ford* claim in his first petition, which was adjudicated on the merits. *Id.* at 937-38. After his execution date was set, Panetti filed another §2254 petition, this time raising a *Ford* claim. *Id.* at 938-39. As we have previously noted, the Court's conclusion speaks volumes for the present debate: "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application when the claim is first ripe." *Id.* at 947. The Court held that "[t]he statutory bar on 'second or successive' *applications* [did] not apply" to a numerically second petition, but only after the Court looked squarely at the prior opportunity to litigate the *claim* pleaded within. *Id.* (emphasis added).

In short, each time the Court has allowed litigation of a claim pleaded in a numerically second (or later) habeas petition since 1996, the Court's decision focused on the petitioner's opportunity to fully and fairly litigate the claim(s) in his previous petition. The focus on the prior opportunity to litigate claims also explains the Court's decision to bar claims in *Burton v. Stewart, supra*, the post-AEDPA case upon which Magwood primarily relies. *See* Blue Br. 25-27.

2. *Burton* was a natural extension of *Slack*. Unlike Slack, Lonnie Burton chose to forgo his opportunity to dismiss his "mixed petition" under *Rose v. Lundy*, opting instead to press the conviction-related claims in his 1998 Petition while exhausting

his sentencing claims in state court. *Id.* at 151-52. After his 1998 Petition was denied, Burton filed another petition in 2002, which raised the previously unexhausted sentencing claims. *Id.* The Court held that Burton's 2002 Petition was "second or successive," distinguishing *Slack* by noting that Burton's first petition "was adjudicated on the merits." *Id.* at 155. In other words, Burton had the opportunity to litigate both his conviction and sentencing claims in a numerically first petition via dismissal and exhaustion under *Rose v. Lundy*, but he failed to take it.

Magwood places great stock in the Court's discussion of which judgment Burton attacked in his 1998 and 2002 petitions. Blue Br. 26-27. Burton was convicted in 1994 and resentenced twice. Thus, Burton had three distinct judgments: the 1994 judgment (1994 conviction plus 1994 sentence), the 1996 judgment (1994 conviction plus 1996 resentence), and the 1998 judgment (1994 conviction plus 1998 resentence). Burton argued that "petitions challenging new judgments are not second or successive when the claims could not have been brought any sooner," Reply Br. 2, *Burton, supra* (No. 05-9222), and that his second (2002) petition was his first opportunity to challenge his 1998 resentence because it was "indisputably his first and only challenge to the 1998 judgment." *Id.* The Court rebuffed Burton's factual assertion, finding that both of Burton's petitions attacked his "1998 Judgment," which consisted of Burton's 1994 conviction and 1998 resentence. *Burton, supra,* at 155-56. Thus, had Burton used *Rose v. Lundy* to dismiss his 1998

Petition without prejudice, his next petition would have presented his one full and fair opportunity to challenge both the 1994 conviction and 1998 resentence.

Contrary to Magwood's suggestion, *Burton* did not answer the question presented here *sub silentio*. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions."). The Court merely responded to Burton's factually and legally incorrect argument by noting that Burton's 2002 petition was the numerically second petition filed after Burton's 1998 resentencing. This is the first case to squarely present the question of whether the first §2254 petition filed after a writ-induced resentencing may contain claims subject to preclusion under §2244(b). And, in line with 86 years of precedent, the Court's answer should turn on Magwood's opportunity to raise his fair-warning claim in his prior petition, which was adjudicated on the merits.

4. The Prevailing "One Opportunity" Rule Vindicates AEDPA's Goals Of Comity, Finality, And Federalism.

One round of federal review of state court judgments "strikes at finality" and federalism. *McCleskey*, *supra*, at 491-92. When that round ends, "having in all likelihood borne for years the

significant costs of federal habeas review, the State is entitled to the assurance of finality." *Calderon*, *supra*, at 556. AEDPA provides that assurance. In essence, §2244(b) serves as a contract that federal courts will not second guess the state courts for a second time on issues that could have been (§2244(b)(2)), or were (§2244(b)(1)), litigated the first time around. The prevailing "one opportunity" rule honors that contract. Magwood's reading of §2244(b), which resurrects claims that achieved closure after round one, evokes a "[p]erpetual disrespect for the finality of convictions [that] disparages the entire criminal justice system." *McCleskey*, *supra*, at 492.

This case provides a prime example of finality's significance. Had Magwood timely raised his fair-warning claim in 1983, we would not be here. If Magwood's claim had been denied in 1986, this second round of habeas litigation would be over. If Magwood's claim had merit, his death sentence would have been declared void, and the State and federal courts would have avoided the "significant costs" of the past 13 years of federal habeas litigation. *Id.* at 490-91. Either way, the parties would have closure.

The desire for closure is not novel to parties. Sheriff Grantham's family shares our finality interest: "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an

interest shared by the State and the victims of crime alike." *Calderon*, *supra*, at 556 (citations omitted). Magwood began filing habeas petitions nine days before his execution date in 1983. Nearly 27 years later, Sheriff Grantham's family has been unable to "move forward knowing the moral judgment will be carried out." *Id.* Worse yet, the sheriff's family has spent the past 13 years waiting on the resolution of a claim that demanded closure in 1986.

Congress intended §2244(b) to promote finality by limiting habeas petitioners to "one bite at the apple." *See, e.g.*, 141 Cong. Rec. S7803, S7832 (1995) (statement of Sen. Biden) ("[We] want to . . . limit the number of petitions that can be filed. So essentially you get one bite out of the apple."); 141 Cong. Rec. S7803, S7877 (1995) (statement of Sen. Dole) ("[B]y limiting condemned killers convicted in State or Federal court to one Federal habeas petition—one bite of the apple—these landmark reforms will go a long, long way to streamline the lengthy appeals process[.] . . . It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out. And, of course, it is terribly unjust to the innocent victims.") The prevailing "one opportunity" rule vindicates AEDPA's purpose. Magwood's rule ignores it.

5. Magwood's Hypothetical Scenarios Are Unavailing.

Respondents briefly address Magwood's hypotheticals. First, both Magwood and his *amici* express concerns that, should a federal court grant sentencing relief on one claim in a first petition, but

leave the remaining claims unadjudicated, the petitioner would lose his ability to re-raise the unadjudicated claims in a post-resentencing petition. Blue Br. 31; NACDL Amicus Br. 10-11, 15-16. Respondents assume, however, that because the claims were not fully adjudicated in the first petition, both the "one opportunity" rule and the Court's decisions in *Slack* and *Martinez-Villareal* would prevent the previously raised, but unadjudicated, claims from being considered "second or successive" in a post-resentencing petition. *See Slack*, *supra*, at 486-87 (holding that the dismissal of claims without prejudice does not count against petitioner); *Martinez-Villareal*, *supra*, at 643-45 (holding that a court must consider a *Ford* claim raised in a second petition that was dismissed on ripeness grounds in the first petition).

Second, Magwood fears that the prevailing "one opportunity" rule allows the state court to make the same mistake twice; that is, the state court may violate the instructions contained in the conditional writ without ramifications under §2244(b). Blue Br. 31-32. Respondents assume that state judges will follow instructions imposed by federal courts in a conditional writ. But if they do not, we also assume that federal courts will consider a petitioner's claim that the state court violated due process by failing to honor the federal court's mandate to have accrued after that mandate was issued, thereby allowing the new claim to be raised in a numerically second petition as freshly ripened under the "one opportunity" rule and *Panetti*. *See Panetti*, *supra*, at 947 (holding that a claim in a numerically second

petition is not barred by §2244(b) when it is "first ripe").

Third, Magwood raises the following scenario: (1) A habeas petitioner fails to raise a claim that the admission of an affidavit violates the Confrontation Clause but receives habeas relief on another guilt-phase claim; (2) before the resulting retrial, this Court releases *Crawford v. Washington*, 541 U.S. 36 (2004); (3) the State ignores *Crawford* and again admits the affidavit at retrial; and (4) the petitioner files a numerically second §2254 petition raising a Confrontation Clause claim for the first time. Blue Br. 30-31. Initially, Respondents note that a full-blown retrial is a different animal than the weighing of two additional mitigating circumstances, which is the question presented. Retrials result in new juries, new questions, and new closing arguments; thus ripening new and distinct claims. So, while the "one opportunity" rule would apply to new trials, its application would be sparse.

Frankly, it is not clear how this 'non-retroactive change in the law before retrial' scenario would play out. Respondents have discovered no cases on point, nor has Magwood cited any. Courts may treat the convergence of new law and new facts stemming from a new trial as creating a "new claim;" thereby giving the petitioner his one opportunity to litigate the claim.

But if this Court (or any court) held that the claim was previously available and is therefore barred by §2244(b)(2), two facts must be

remembered. First, Congress can limit the scope of the writ, *see Bollman*, *supra*, at 94, and Congress intended to preclude previously available habeas claims that are based on a non-retroactive change in the law. *See* 28 U.S.C. §2244(b)(2)(A). Second, AEDPA does not eliminate review of the hypothetical claim, just a second round of *federal habeas* review of the claim. If a state trial court ignores *Crawford* during a retrial, the defendant still has recourse on direct appeal in the state appellate courts, and then in this federal Court, which sits in judgment free from the constraints of AEDPA. So, even if §2244(b) applies to Magwood's hypothetical, it does not "immunize blatant constitutional transgressions at resentencing (or retrials) from federal scrutiny." Blue Br. 14. It merely prevents the hypothetical petitioner from embarking on a second, years-long trek through the federal court system to raise a claim that he could have raised in his first §2254 petition. That was precisely Congress' intent.

Again, it is telling that Magwood relies on hypotheticals, not actual examples, despite application of the prevailing "one opportunity" rule for more than a decade. The sky has not fallen, and should unforeseen issues arise under §2244(b), the federal courts will handle them on a case-by-case basis as they have done since AEDPA's passage. The legitimate fear in this case is the ramification of Magwood's reading of §2244(b): resurrection of every claim that was, or could have been, adjudicated in a first habeas petition. *See infra* at 46-52.

C. MAGWOOD'S READING OF §2244(b) IS NOT COMPELLED BY AEDPA'S TEXT, AND IT DEFIES AEDPA'S PURPOSE.

To hide the abusive nature of his fair-warning claim, Magwood argues that §2244(b) is only triggered by attacks on "the same judgment," Blue Br. 13, a term foreign to §2244(b)'s text. In other words, Magwood claims that §2244(b) should read

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application [*against the same judgment*] shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application [*against the same judgment*] shall be dismissed unless –

28 U.S.C. §2244(b)(1), (2) (exceptions omitted). Under Magwood's amended statute, "[w]hen a new judgment is entered, the counting of petitions begins afresh." Blue Br. 13. Accordingly, if a numerically second petition attacks a new judgment, "a court has no statutory authority to dismiss any particular 'claim' on the ground that it is somehow 'second or successive.'" Blue Br. 18.

Magwood, however, repudiates his own theory. Magwood's argument hinges on the notion that "a habeas application challenging a new judgment for

the first time cannot be second or successive in any respect." Blue Br. 16. Yet, Magwood acquiesces that any post-resentencing claim "that challenged his *conviction* would be successive." Blue Br. 21, n.8. This concession erodes Magwood's argument in two ways. First, as *Burton* made clear, a petitioner's underlying conviction constitutes part of the new judgment. *Burton*, *supra*, at 155-57. Therefore, Magwood is conceding that a significant portion of a new judgment is subject to §2244(b)'s reach. Second, to weed out conviction-based claims, a court must open a petition attacking a new judgment to review the nature of its claims. This claim-by-claim review contradicts Magwood's theory that reviewing the claims inside a post-resentencing petition is barred by §2244(b). Blue Br. 18. Magwood likely washes his hands of the conviction-portion of his "new judgment" theory because he recognizes the theory's pernicious result: the resurrection of previously-available habeas claims. *See Panetti*, *supra*, at 946 (warning against "an interpretation of [§2244(b)] that would 'produce troublesome results'").

1. Magwood's Theory Resurrects Claims That Could Have Been, Or Even Were, Adjudicated In A Previous Petition.

Under Magwood's theory, resentencing emasculates both §2244(b)(1) and §2244(b)(2) because both provisions use the term "second or successive habeas corpus application." With §2244(b)(1) neutralized, a petitioner can resurrect every claim that was denied in his first habeas petition. Absent §2244(b)(2), the petitioner can add

countless more claims that could have been, but were not, raised in his first petition.

This result may seem genteel presently because only one of Magwood's abusive claims made it to this Court.[14] But that is *this* case. Future cases will, no doubt, be different. For example, adopting Magwood's "new judgment" theory would allow petitioners to supplement two claims that originated at resentencing with 50 successive and abusive claims. Worse yet, a resentenced petitioner could choose to complete a second loop through the federal courts without raising a single claim that originated at resentencing. In fact, under Magwood's theory, a post-resentencing petitioner could simply staple a new cover page with the words, "§2254 Petition Attacking New Judgment," to his previously adjudicated petition and §2244(b) would have no application. While the odds are that the State would ultimately prevail against this tactic, the State would spend years litigating the successive and abusive claims at each federal court level, where the court of appeals would have conclusively rejected the claims in 30 days under §2244(b)(3).

Rebooting any habeas proceeding after resentencing is a "troublesome result." *Panetti*, *supra*, at 946. But it is devastating in capital cases, AEDPA's primary target. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA

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[14]To be clear, the resurrection of even one abusive or successive claim violates §2244(b) and is an affront to AEDPA's goals of "comity, finality, and federalism." *Panetti*, *supra*, at 945.

to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases."). Capital habeas proceedings are the most burdensome and time-consuming cases in federal court. It is not even close. When the Federal Judicial Center reassigned case weights in 2004, it determined that an average capital habeas proceeding requires 5,685 "judge minutes" to pass through the district court alone. Federal Judicial Center, *2003-2004 District Court Case Weighing Study*, App. X, Table 1. Not only did this number top the list, it exceeded the amount of time that judges required to dispose of the second (Environmental Matters) and third (Civil RICO) most burdensome cases combined—by 35%. *Id.* Where an average federal proceeding weighs 1.0, a capital habeas proceeding weighs 12.89. *Id.* This gross disparity is easily explained. A 2007 study revealed that the average capital petitioner raises 28 claims; 5% of petitioners raise more than 88 claims; and multiple petitioners have raised over 200 claims in a single habeas petition. Nancy J. King, *et. al*, *Final Technical Report: Habeas Litigation in U.S. District Courts*, (2007), available at http://www.ncjrs.gov/pdf files1/nij/grants/219559.pdf. In cases involving resentencing, Magwood essentially asks the Court to multiple these numbers by two.

Magwood attempts to mitigate this pernicious result in two footnotes. Neither provides relief.

1. As previously mentioned, *supra* at 45-46, Magwood retreats from his theory that any attack on a new judgment is immune from §2244(b) by asserting that claims within a post-resentencing

petition "that challenged [a petitioner's] *conviction* would be successive." Blue Br. 21, n.8. But Magwood's "new judgment" theory is not so easily jilted. Magwood's proposed distinction between conviction and sentence is both legally wrong and practically unworkable in death penalty cases.

In *Burton*, the Court rebuffed the contention that the new judgment stemming from resentencing includes the new sentence but not the original conviction. *Burton*, *supra*, at 155-57; *see, e.g.*, *Ferreira v. Sec'y, Dep't. of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) (applying *Burton* to restart AEDPA's one-year statute of limitation for all claims upon resentencing because "the judgment to which AEDPA refers is the underlying conviction and most recent sentence"). In fact, Magwood's *amici* acknowledge the rule: "[T]his Court has held in a number of different contexts that a criminal judgment includes both a conviction and associated sentence." NACDL Amicus Br. 7. In the light of *Burton*, if the first petition attacking a new judgment is immune from §2244(b), as Magwood claims, then resentencing resurrects successive or abusive claims against both the conviction and the sentence.

Furthermore, the wall Magwood erects between claims attacking a capital conviction and its corresponding death sentence is quite permeable. Take this case for example. The two mitigating circumstances added to Magwood's 1986 resentence were based on the guilt-phase testimony of four mental health experts, so every guilt-phase claim concerning those witnesses relates to Magwood's

1986 resentence to the same extent his fair-warning claim does. And, as is often the case, Magwood's underlying conviction also serves as his aggravating circumstance; therefore, *every* claim attacking Magwood's 1981 conviction challenges his 1986 resentence to the same extent his fair-warning claim does.[15] Simply put, federal courts cannot easily divorce many claims attacking a capital conviction from claims attacking its corresponding death sentence. Often, they are inextricably intertwined.

Magwood knows this. He argued it below. The circuit court refused to authorize Magwood's *Brady* claim regarding the guilt-phase mental health experts under §2244(b)(3). *In re Magwood*, *supra*, at 1548-49. Undaunted, Magwood argued to the district court that the same *Brady* claim was nonetheless available to attack his 1986 resentence because the claim affected his penalty-phase defense. That argument spawned five supplemental briefs and took more than three years to resolve. (1997-R: Docs. 69, 71, 72, 75, 76, 78, 79, 112.)

2. To salvage §2244(b)(1)'s bar against previously adjudicated claims, Magwood claims that "ordinary *stare decisis* and collateral estoppel . . .

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[15]"[T]wo-thirds of the death sentences imposed in Alabama involve cases of robbery/murder." *Brown v. State*, 11 So. 3d 866, 933 (Ala. Crim. App. 2007). Murder during a robbery is also an aggravating circumstance. *See* Ala. Code §13A-5-49(4) (2006). Accordingly, even if Magwood's 'conviction versus sentence' dichotomy was legally correct, an overwhelming majority of Alabama's capital petitioners could resurrect their guilt-phase claims by arguing (like Magwood) that it affects the reapplication of their aggravating circumstance.

apply with full force in habeas proceedings." Blue Br. 24-25, n.10. Magwood is mistaken; §2244(b)(1) exists precisely because such doctrines do not prevent the re-litigation of habeas claims.

Res judicata in its broadest sense (*i.e.* claim preclusion and issue preclusion) never has applied to habeas proceedings. *See Salinger*, *supra*, at 230. In fact, the abuse of the writ doctrine was born when the Court held in *Salinger* that *res judicata* did not prevent a habeas petitioner from raising "the same grounds" rejected in his first petition. *Id.* As for *stare decisis*, it is not an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor does it apply horizontally one-way, vertically either way, or at all in the majority of habeas cases that end with an unpublished opinion. *See, e.g.*, Eleventh Circuit Rule 36-2 ("unpublished opinions are not considered binding precedent"). At best, *stare decisis* functions as a screen door, where §2244(b) stands as a steel barricade.

Magwood also misses AEDPA's bigger picture. Even if either doctrine ultimately prevented habeas relief on a successive claim, the State would have spent years litigating the doctrine's applicability, its exceptions, and likely the merits of the underlying claim. Congress' intent for AEDPA was to eradicate successive claims in 30 days to avoid such protracted litigation. *See* 28 U.S.C. §2244(b)(3).

In sum, Magwood's reading of §2244(b) lacks a limiting principle that prevents the resurrection of a petitioner's prior habeas case. This result poses a

serious threat to the States and to the federal courts because, while Magwood concedes his guilt-phase and previously adjudicated claims to this Court, future petitioners (especially capital petitioners) will not share his benevolence.

2. Magwood's Theory Wrongly Adds Language To Congress' Chosen Text.

Again, AEDPA's primary purposes were "to further the principles of comity, finality, and federalism" and "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford*, *supra*, at 206. Congress did not contradict itself by compelling the resurrection of stale claims with §2244(b)'s text.

Magwood bases his application-focused, "new judgment" reading of §2244(b) on two textual points. First, §2254 petitions are filed by state prisoners who are "in custody pursuant to the judgment of a state court." 28 U.S.C. §2254(a). Second, "the words 'application' and 'claim' in AEDPA mean different things" and the term "second or successive" modifies "application," not "claim." Blue. Br. 17-18.

It is true that §2254 petitioners are in custody pursuant to a judgment. But it does not follow that Congress therefore modified §2244(b)'s phrase "second or successive habeas corpus application" with "challenging the same judgment," any more than Congress intended §2244(b)'s benchmark for counting petitions to be "challenging the same custody" or "seeking similar relief" or "by the same person" or "in the same case," each of which would

cut against Magwood in this case.[16] Congress chose to follow the phrase "second or successive" with "habeas corpus application under Section 2254" and nothing more.

Like Magwood, Respondents can cherry-pick language from outside §2244(b)(2) to support a foreign benchmark. Take "challenging the same custody" for example. Section 2244(a) states that an "application for a writ of habeas corpus" need not be entertained "if it appears that *the legality of such detention* has been determined . . . on a prior application for a writ of habeas corpus." 28 U.S.C. §2244(a) (emphasis added). Similarly, the Court concluded *Burton* by stating that "Burton neither sought nor received authorization from the Court of Appeals before filing his 2002 petition, a 'second or successive' petition *challenging his custody*, and so the District Court was without jurisdiction to entertain it." *Burton*, *supra*, at 157 (emphasis added). In fact, if §2254(a) provided the benchmark for counting petitions in §2244(b), "custody," not "judgment," would be the stronger candidate. Section 2254 petitions may be considered "only on the ground that [the petitioner] *is in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a) (emphasis added). Being held "pursuant to the judgment of a State court" is merely §2254's "status requirement," not its "substance requirement." James S. Liebman

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[16]Unlike his judgment, Magwood's custody did not change as a result of the 1986 resentencing. Respondents have maintained "the same custody" of Magwood since his conviction in 1981.

& Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, §8.1 at p.391 (5th ed. 2005). That is why §2254 petitions not only attack a petitioner's judgment of conviction and sentence, but sometimes "the duration of sentence . . . and the conditions under which that sentence is being served," including administrative rules such as "the basis of parole" and "good time" credits.[17] *Id.* at §9.1, p.475-81.

Respondents' point, of course, is not to advocate adding "the same custody," or any other phrase, to §2244(b)'s text. Congress chose the phrase "second or successive habeas corpus application under Section 2254," and this Court has warned against reading words "into AEDPA's provisions governing second or successive petition and motions (28 U.S.C. §§2244(b) and 2255[h]) [when] Congress did not put those words there." *Mayle v. Felix*, 545 U.S. 644, 661 n.6 (2005). We simply note that, by utilizing Magwood's textual approach, a case can be made for benchmarks other than "the same judgment."

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[17]Courts faced with applying §2244(b)'s "second or successive" language to numerically second §2254 petitions challenging the administration of the petitioner's sentence have applied the prevailing "one opportunity" rule. *See, e.g.*, *Benchoff v. Colleran*, 404 F.3d 812 (3d Cir. 2005) (holding that petitioner's "parole claim" was barred under §2244(b) because it "had ripened" by the time he filed his first §2254 petition); *James v. Walsh*, 308 F.3d 162 (2d Cir. 2002) (holding that §2254 claim challenging the recalculation of the petitioner's sentence was not barred under §2244(b) because it "did not exist" when the first petition was filed).

As for Magwood's contention that the term "second or successive" modifies the word "application," thereby forcing the Court to focus solely on Magwood's paper application, Blue Br. 17-18, Magwood cannot have it both ways. If the Court must confine itself solely to the text of §2244(b), then the Court must limit the term "second or successive" to numerically second petitions, just as §2244(b)'s text dictates. Only when the Court steps outside of AEDPA's plain text does "second or successive" become a "term of art" for interpreting §2244(b)'s preclusive effect. *Slack*, *supra*, at 486. At that point, the Court clearly demonstrated in *Panetti* that it is the nature of the *claims*—specifically, the prior opportunity to raise the claims—that counts. *See also Pace*, *supra*, at 416 ("the 'requirements' of the subsection [§2244(b)] are not applicable to the application as a whole; instead, they require inquiry into specific 'claim(s)'").

3. Magwood's Reliance On *Richmond v. Lewis* Is Unavailing.

Magwood grounds his "new judgment" theory in two of this Court's cases. Blue Br. 25-27. Respondents addressed Magwood's reliance on the post-AEDPA case, *Burton v. Stewart*, *supra* at 37-39. We now address Magwood's pre-AEDPA precedent, *Richmond v. Lewis*, 506 U.S. 40 (1992).

The simple response to *Richmond* is that the Court's decision is inapposite here. *Richmond* held that an aggravating factor was unconstitutionally vague and nothing more. The question of whether Richmond's claim was barred by former §2244(b) was

not before the Court because (1) before AEDPA, §2244(b) was non-jurisdictional and had to be pleaded by the State, *see McCleskey*, *supra*, at 494 and (2) §2244(b) was not raised during briefing. Magwood's contention that the Court's "decision to grant review" indicates that Richmond's claim did not violate §2244(b) is contradicted by this Court's decision to grant review in *Burton*, *supra*, only to vacate on §2244(b) grounds after the State argued §2244(b) during merits briefing. *See id.* at 157.

Willie Richmond's case is not devoid of value, however. Like Magwood, Richmond was resentenced to death after gaining habeas relief. *See Richmond v. Ricketts*, 774 F.2d 957, 959 (9th Cir. 1985). Like Magwood, Richmond raised "new and different grounds" in his post-resentencing habeas petition, which the district court dismissed as abusive because the new claims were "known to Richmond and should have been alleged in the first petition." *Id.* at 961. Richmond's claims were reinstated only because the Ninth Circuit interpreted this Court's 1963 *Sanders* decision to require "a conscious decision deliberately to withhold [the claims]." *Id.* (citing *Sanders*, *supra* at 18). One year after the Ninth Circuit's 1990 ruling, however, this Court held that "[a]buse of the writ is not confined to instances of deliberate abandonment." *McCleskey*, *supra*, at 489. "[A] petitioner may abuse the writ by failing to raise the claim through inexcusable neglect." *Id.*

As a result, if *Richmond* sheds any light on this case, it serves as evidence that district courts were applying the "one opportunity" rule to post-

resentencing capital habeas petitions *before* AEDPA. And the *Richmond* district court's application of today's prevailing rule was reversed only because the circuit court misread this Court's abuse of the writ precedent.

* * *

In summary, Magwood seeks to replace the prevailing application of §2244(b) with a theory that is not compelled by AEDPA's plain language and fails the interpretive factors this Court espoused in *Panetti*. Magwood's assertion that the abuse of the writ doctrine "was designed to curb repetitive challenges to the *same* judgment" is historically inaccurate. Blue Br. 13. Magwood's reading of §2244(b) turns AEDPA's goal of promoting "comity" and "federalism" on its head by spawning a second round of federal courts second guessing the state courts on the same issue. *Panetti*, *supra*, at 945. And Magwood's rule flaunts "finality" by creating the "troublesome result" of lengthy habeas proceedings on claims that could have been, or even were, adjudicated years earlier. *Id.* at 945-46.

D. Magwood's Fair-warning Claim Is Barred Under The Prevailing "One Opportunity" Rule.

Should the Court apply the prevailing "one opportunity" rule, Magwood's framing of the question presented resolves the pertinent issue. Magwood acknowledges in the question presented that he "could have challenged his previously imposed (but

now vacated) sentence on the same constitutional grounds" in his 1983 Petition. Pet. i.

Magwood's fair-warning claim ripened at his 1981 trial, when the State chose to rely on the murder of a sheriff as its aggravating circumstance pursuant to the 1975 Alabama Code. Thus, as he admits, Magwood could have raised a fair-warning claim at his 1981 trial and in his 1983 Petition. Because Magwood had a full and fair opportunity to adjudicate his fair-warning claim in his 1983 Petition—and, in fact, was ordered to do so (App. 12a)—the court of appeals properly dismissed Magwood's fair-warning claim under §2244(b)(2). Pet. App. 15a-16a.

* * *

In July, Magwood will commence his thirtieth year on Alabama's death row. He will have spent more than 13 years of that time (~45%) in a second stint in federal court, primarily litigating a claim that should have been adjudicated in 1986. Adoption of the prevailing "one opportunity" rule cannot guarantee the prevention of similar delays in all resentencing cases. But one thing is certain: If the Court adopts Magwood's resurrection rule, future capital petitioners will re-litigate their habeas case after resentencing to clog the federal courts. In those cases, Magwood's delay will shift from being the exception to the norm. AEDPA does not dictate that result.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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February 3, 2010

APPENDIX

28 U.S.C. §2244(a). 1a

28 U.S.C. §2244(b). 2a

28 U.S.C. §2255(h). 4a

Motion To Compel Petitioner To
Present All Conceivable Claims
Or Have Them Barred (Sept. 28, 1983)[18]. 5a

Order (Oct. 27, 1983)[19]. 9a

---

[18]*See* 1983-R: Doc. 57 at 1-2

[19]*See* 1983-R: Doc. 74 at 3

28 U.S.C. §2244(a)

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. §2244(b)

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. §2255(h)

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BILLY JOE MAGWOOD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 83-H-760-N
	)	
FRED SMITH, Commissioner, Alabama Department of Corrections, and WILLIE JOHNSON, Warden, Holman Unit,	)	
	)	
Respondents.	)	

MOTION TO COMPEL PETITIONER
TO PRESENT ALL CONCEIVABLE
CLAIMS OR HAVE THEM BARRED

Respondents move this Honorable Court to enter an order requiring petitioner to present through amendment to his petition by a date certain any and all conceivable grounds for habeas corpus relief he wishes to present, with notice that failure to raise a ground by that date will be deemed a waiver of his right to raise it. In support of this motion, respondents show the following:

1. The interests of all parties concerned with this case dictate that the validity of petitioner's conviction and sentence be fully litigated in as expeditious a manner as possible and that piecemeal litigation of claims and issues be avoided. The best way to ensure this result is through an order compelling petitioner to present all conceivable claims and issues under penalty of having them barred from future proceedings if he fails to present them now.

2. Such an order was entered by Judge Hand of the Southern District in the habeas corpus proceeding involving John Louis Evans, III. In his speech to the Eleventh Circuit Conference in May of this year, Justice Powell praised Judge Hand's order as a "constructive step" and as "commendable." 69 A.B.A.J. 1000 (August, 1983) [Ex. A, hereto].

3. Since that time Judge Hand has also entered such an order in *Ritter v. Smith*, No. 83-0457-H-S (S.D. Ala. May 11, 1983) (unpublished order) [Ex. B, hereto], and Judge Pointer entered such an order in *Raines v. Smith*, No. 83-P-1080-S (N.D. Ala. May 18, 1983) (unpublished order) [Ex. C, hereto].

WHEREFORE, for these reasons, respondents respectfully request this Honorable Court to enter the requested order.

Respectfully submitted,

s/ Charles Graddick [by] EdC
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s/ Ed Carnes
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CERTIFICATE OF SERVICE

I certify that I have served a copy of this motion on petitioner by mailing a copy of it to his attorney, postage prepaid and properly addressed to him as follows:

Hon. J. L. Chestnut, Jr.
Chestnut, Sanders, Sanders & Turner
P.O. Box 1305
Selma, Alabama 36701

Done this the 28th day of September, 1983.

s/ Ed Carnes
ED CARNES
ALABAMA ASSISTANT
ATTORNEY GENERAL

[Exhibits to motion omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BILLY JOE MAGWOOD,	)	[Clerk's file stamp omitted]
	)	
Petitioner,	)	
	)	
vs.	)	No. 83-H-760-N
	)	
FRED SMITH, Commissioner, Alabama Department of Corrections, and WILLIE E. JOHNSON, Warden, Holman Unit,	)	
	)	
Respondents.	)	

ORDER

This case, which involves a prisoner on death row who is seeking a writ of habeas corpus, comes before the Court on respondents' motion to waive the requirement that petitioner exhaust his state remedies. Petitioner currently is appealing the Coffee County Circuit Court's denial of his petition for a writ of error coram nobis. Respondents wish to proceed with petitioner's federal court action simultaneously with petitioner's state court appeals. For the reasons stated below, this Court will not accept respondents' waiver at this time.

The Eleventh Circuit recently made clear that this Court has discretion to accept or reject respondents' waiver of the exhaustion requirement of 28 U.S.C. § 2254. *Thompson v. Wainwright*, No. 82-6052 (11th Cir. Sept. 6, 1983). Respondents clearly have the power to waive exhaustion, *id.*; Ala. Code § 36-15-21, and this Court need not accept that waiver. *Thompson v. Wainwright*, *supra*, at 5023. Although the Eleventh Circuit did not establish any set standards to guide this Court in the exercise of its discretion, several considerations emerge from the *Thompson* opinion. The development of a factual record in the state courts will aid the federal court in its review. Initial resort to state procedures also may obviate the need for federal review because petitioner may succeed in state court. The federal court also may consider whether extensive fact finding is involved, how long a delay exhaustion will entail, and whether unresolved issues of state law exist. *Id.*

The Court does not agree with respondents' argument that it may reject their waiver only while petitioner pursues trial level, as opposed to appellate level, state court review. Initially the Court notes that the Eleventh Circuit does not seem to have made the distinction that respondents urge. *Id.* at 5017. More importantly, although the Alabama appellate courts are unlikely to aid this Court by making further fact findings, the other federalism concerns cited by the *Thompson* court remain operative at the state appellate level.

Those other concerns persuade the Court that it should not accept respondents' waiver at this time. Respondents argue that petitioner's appeal has no chance of success. Petitioner has appealed the state circuit court's refusal to suspend his death sentence due to his present insanity. Respondents argue, with some justification, that Ala. Code § 15-16-23 permits no appeal from such a decision. Petitioner, however, states that he will challenge the constitutionality of the "no appeal" provision. The Court notes that the Alabama courts have as yet had no opportunity to examine § 15-16-23, and believes that they should have such an opportunity before this Court proceeds with its determination. Petitioner also is appealing the circuit court's denial of his claim of ineffective assistance of counsel. In particular, petitioner points to the failure to inquire into prospective jurors' racial views on voir dire in a case presenting the potential for racial bias. The Court is not prepared to characterize this claim as futile.

The Court is mindful, of course, of the state's interest in curtailing the long and costly process of appeals in capital cases. The parties have estimated that the state courts will take roughly one year to reach a final ruling on petitioner's error coram nobis petition. After that, the lengthy federal process awaits. If and when the Court of Criminal Appeals rules against petitioner, the Court will consider any arguments respondents wish to present in support of their waiver.

It is hereby ORDERED that respondents' motion to waive exhaustion is denied at this time.

It is further ORDERED that respondents' motion to compel petitioner to present all conceivable claims is granted. Petitioner is hereby ORDERED to present all possible grounds for habeas corpus relief within thirty days of the date of this order. Petitioner will be deemed as of that date to have waived the right to present any ground not yet presented.

DONE this 27th day of October, 1983.

s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

REPLY BRIEF

No. 09-158

SUPREME COURT, U.S.
FILED
MAR 5 - 2010
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IN THE

Supreme Court of the United States

BILLY JOE MAGWOOD,

Petitioner,

v.

TONY PATTERSON,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

For thirty years, the State has been trying to execute petitioner for an act that was not punishable by death under state law when he committed it. Pet. App. 45a. The State first tried to accomplish this feat by urging state courts to retroactively change state law. Having succeeded initially on that score, but now facing decisions from a federal district court and the Alabama Supreme Court making clear that petitioner's crime was not a capital offense, the State asks this Court to rewrite federal habeas law so it can carry out petitioner's unconstitutional sentence.

This Court should refuse to do so. Section 2244 provides that a claim may be dismissed as abusive only when it is presented in a "second or successive habeas corpus application." 28 U.S.C. § 2244(b). And for decades, courts and practitioners have understood that when, as here, a petition challenges a new state-court judgment, it is not "second or successive." It is a first petition, because it challenges a judgment that has never been challenged in a prior application.

The State's proposal to decide on a claim-by-claim basis whether prisoners who file petitions against new sentences had a "prior opportunity" to raise equivalent claims disregards all of this established statutory and decisional law. It would erase the "second or successive" threshold inquiry from Section 2244(b). It would revamp Section 2244(b)'s abuse-of-the-writ rules. And if all of that were not enough, the State's proposal would give rise to a multitude of administrative and jurisprudential difficulties, some of which even the State acknowledges it cannot answer – and *none* of which

any court has ever addressed, for the State's assertion that its proposal tracks a "prevailing rule" in the lower courts, Resp. Br. 17, is belied by the simple fact that no court besides the Eleventh Circuit has ever held that a habeas petition challenging a new sentence for the first time is successive. By contrast, the easily administrable "new judgment" principle has proved workable in the past and will continue to prove so in the future. This Court should reaffirm that previously unquestioned principle.

I. The State Mischaracterizes Two Important Aspects Of The Background Of This Case.

Before turning to the merits of the question presented, it is important to correct two distortions concerning the background of this case that infect the State's brief.

A. Petitioner Stands Sentenced To Death For A Crime That Was Not A Capital Offense When He Committed It.

The district court held that "[a]t the time Magwood committed his offense, . . . state law did not allow for him to be sentenced to death" because none of the aggravating circumstances listed in Ala. Code § 13-11-6 were present. Pet. App. 45a; *see also* Pet. App. 103a. Magwood's death sentence, therefore, violates the Due Process Clause as construed in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Fiore v. White*, 531 U.S. 225 (2001). The Eleventh Circuit did not disagree. Thus, as this case comes to this Court, the State is seeking to execute someone who is "'actually innocent' of the death penalty," Pet. App. 57a, on the ground that his habeas petition objecting to such state action is successive.

The State spends four pages trying to muddy the waters of this reality, arguing that the Alabama Code as of 1979 could have been construed to allow a court to impose capital punishment without finding any of the aggravating circumstances listed in Section 13-11-6. Section 13-11-2, the State asserts, also "[c]ontained . . . aggravating circumstances" that could support a death sentence. Resp. Br. 5. It takes, however, but a single sentence of the Alabama Code to respond: "If the court imposes a sentence of death, it shall set forth in writing, *as the basis for the sentence of death*, findings of fact from the trial and the sentence hearing, which shall at least include . . . [o]ne or more of the aggravating circumstances *enumerated in section 13-11-6*, which it finds exists in the case." Ala. Code § 13-11-4 (emphasis added). Accordingly, there can be no doubt that the only aggravating circumstances that would have sufficed to sentence petitioner (or anyone else) to death were those listed in Section 13-11-6. Indeed, contrary to the State's suggestion that Section 13-11-2 also set forth "aggravating circumstances," Resp. Br. 5, that term appeared nowhere in that section; that section listed only "aggravated *offenses*" – namely those crimes one of whose commission was necessary, but not sufficient, to expose defendants to the possibility of capital punishment. Ala. Code § 13-11-2 (emphasis added).

Any lingering doubt on this score was erased when the Alabama Supreme Court held in *Ex parte Stephens*, 982 So. 2d 1148 (2006), that Alabama's statutory scheme "permits the trial court and advisory jury to consider only those aggravating circumstances listed in § 13A-5-49," which is the

recodified version of Section 13-11-6. 982 So. 2d at 1153. The State asserts that *Stephens* limited itself to construing the new statutory scheme and that the statement in *Ex parte Kyzer*, 399 So. 2d 330 (1981), that an aggravating circumstance in Section 13-11-6 was unnecessary still controls as to the old scheme. Resp. Br. 7 n.4. The *Stephens* decision, however, speaks for itself. Suffice it to say that *Stephens* does not distinguish between the old and new versions of the Alabama Code. Instead, the Alabama Supreme Court squarely held that its "dicta" in *Kyzer* "was incorrect." *Stephens*, 982 So. 2d at 1153.[1]

B. No Part Of Petitioner's First Death Sentence Survived The First Grant Of Habeas Relief.

When the Eleventh Circuit was reviewing the district court's first grant of habeas relief, the State emphasized – and the Eleventh Circuit, of course, agreed – that "a federal district court or court of appeals has no appellate jurisdiction over a state criminal case and hence has no authority to 'remand' a case to the state courts." *Magwood v. Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). Rather, federal law gives federal courts the power to issue a writ of habeas corpus to the extent – and only to the extent – a prisoner is being held "in violation of the Constitution." 28 U.S.C. § 2254(a). And when a writ

---

[1] The State suggests that petitioner "never cited" *Stephens* to the Eleventh Circuit. Resp. Br. 7 n.4. This is not true. The decision was published after briefing was complete, so petitioner notified the Eleventh Circuit of this new authority in a letter filed under Fed. R. App. P. 28(j).

is issued, the writ leaves it entirely to the State and the state courts to decide how to proceed further. *See, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 86-87 (2005) (Scalia, J., concurring).

The State, however, now portrays petitioner's first grant of federal habeas relief as though it were a mandate on direct appeal that merely issued a "limited command" to the state trial court to "add two mitigating circumstances to Magwood's sentencing calculus." Resp. Br. 16, 19; *accord* Resp. Br. 43. Consequently, the State asserts, "[a]t that point," it became "entitled to the assurance of finality on every other issue" pertaining to Magwood's death sentence. *Id.* at 19 (internal quotation marks omitted).

This attempt to revise history has no basis in fact or law. The district court granted a "conditional writ" as to petitioner's first death sentence. *Magwood*, 791 F.2d at 1450. "Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one." *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring). Such writs do *not* allow federal habeas courts to order "forms of relief short of release." *Id.* So the State's only two choices upon the district court's grant of habeas relief were to release petitioner from his death sentence or to seek an entirely new sentence in a constitutional manner. *Id.*; *see also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 33.3 (5th ed. 2005) (A conditional writ as to a sentence "require[s] the state either to release the prisoner from [his sentence] or to . . . resentence [him] in a constitutional manner within a 'reasonable' period of time.").

The State elected to seek a new death sentence. Accordingly, the trial court, in its own words, "conducted a new sentencing hearing and offered the parties the opportunity to submit evidence, argument, and briefs." Pet. App. 103a. And as a "result of a complete and new assessment of all of the evidence, arguments of counsel, and law," *id.*, the court rendered a new judgment sentencing petitioner to death. Pet. App. 106a. Contrary to the State's wishes, therefore, it has no finality interest in anything that occurred at petitioner's first sentencing proceeding; the first sentencing judgment was entirely vacated long ago.

II. A Claim In A Habeas Petition Challenging A New Judgment For The First Time Cannot Be Treated As Part Of A Successive Petition.

A. The Eleventh Circuit's Ruling Contravenes AEDPA And This Court's Precedent.

Petitioner has explained that the Eleventh Circuit erred for the simple reason that a petition challenging a new sentencing judgment for the first time cannot be deemed successive. The State's attacks on this "new judgment" principle fail. And each of the alternative systems the State proposes for dealing with challenges to new judgments conflicts with AEDPA's text, structure, and history, as well as this Court's precedent.

1. The State raises three principal objections to deciding this case on the straightforward basis of the new judgment principle. None, however, has merit.

a. First, the State asserts that the term "judgment" is "foreign" to Section 2244, thereby rendering it improper to count applications with

respect to particular judgments. Resp. Br. 17, 52-54. Nothing could be further from the truth.

There are two basic types of petitions for writs of habeas corpus. The first type, which must be brought under 28 U.S.C. § 2241, asks the *executive* to supply its basis for holding an individual on its own volition and then subjects that asserted basis to legal scrutiny. *See, e.g., Rasul v. Bush*, 542 U.S. 466, 473-74 (2004). The second type – the type at issue here – arises when a *warden* is incarcerating a prisoner, and is doing so for a particular (and facially legitimate) reason: a court's *judgment* establishing a criminal conviction and sentence directs him to do so. The existence of that judgment thus triggers proceedings to determine its validity.

Recognizing the importance of the category of habeas cases in which a state-court judgment of conviction and sentence is the basis for custody, Congress has established a detailed statutory regime and set of rules for adjudicating such controversies. The relevant statutory provisions are collected primarily in 28 U.S.C. § 2254, which governs "an application for a writ of habeas corpus in behalf of a person in custody *pursuant to the judgment of a State court.*" 28 U.S.C. § 2254(a) (emphasis added); *see also* 28 U.S.C. § 2241(d) (establishing personal jurisdiction and venue for applications filed by a person "in custody under the judgment and sentence of a State court"); *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (the goal of a petition under Section 2254 is to "demonstrate the invalidity of [an] outstanding criminal judgment").

Because the very thing a petition brought under Section 2254 challenges is "the judgment of a State

court," the Rules Governing Section 2254 Cases in the United States District Courts naturally define each "application" based on the particular judgment the prisoner is challenging. Rule 2(b), for example, requires the prisoner to "ask for relief from the state-court judgment being contested." The instructions to the form appended to the Rules, which "[t]he petition must substantially follow," Rule 2(d), explain that the prisoner is "asking for relief from the conviction or sentence" of a state court. Instructions to Form Petition Under 28 U.S.C. § 2254. The form itself directs the prisoner to identify the "court that entered the judgment of conviction you are challenging," and the dates of the "judgment of conviction" and "sentencing." Form ¶¶ 1(a), 2(a), 2(b). Finally, "[a] petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court." Rule 2(e).

The State is simply wrong, therefore, in asserting that one cannot focus on the judgment a habeas applicant is challenging without improperly "judicially append[ing]" language to Section 2244's "second or successive" provisions. Resp. Br. 23. It is a standard canon of statutory construction that particular phrases must be construed in relation to the statute as a whole. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995). And, here, the word "application" in Section 2244(b)'s repeated phrase "second or successive habeas corpus application under section 2254" must refer to an application for *something*. That something is relief from a state-court judgment. Reading "against the same judgment" into Section 2244 is not amending it, but

merely following the cross-reference in order to understand what is necessary to make an application a "second or successive" one.

The State is, of course, correct that the history of habeas corpus includes instances in which prisoners were "not attacking a judgment of conviction or sentence." Resp. Br. 33. But such habeas petitions, as explained *supra* at 7, must be brought under 28 U.S.C. § 2241, not Section 2254. And this case involves only whether a "habeas corpus application *under section 2254*" is "second or successive." 28 U.S.C. § 2244 (emphasis added). The history as to *that* issue is clear: "Before AEDPA's enactment, the phrase 'second or successive' meant the same thing it does today – [a] subsequent federal habeas application *challenging a state-court judgment that had been previously challenged in a federal habeas application.*" *Panetti v. Quarterman*, 551 U.S. 930, 964 (2007) (Thomas, J., dissenting) (emphasis added); *see also* Pet. Br. 18-21.

b. The State next contends that a prisoner's judgment cannot be the proper benchmark for deciding whether an application is successive because such an approach would have to allow a prisoner who is resentenced to challenge not only his new sentence but also his conviction in a second habeas petition. Resp. Br. 49.

This assertion, however, misapprehends habeas law and this Court's precedent. A state-court criminal judgment always has two components that may be challenged in a habeas petition – a conviction (enabling the *fact* of incarceration), and a sentence (establishing its *terms* or *duration*). *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 487-89 (1973). In

resolving a habeas challenge, a federal court may grant the writ as to "the conviction *or* the sentence." Instruction 1 to Form Petition Under 28 U.S.C. § 2254 (emphasis added). Indeed, if the sentence is the only part of the judgment that is unconstitutionally imposed, a federal court has the power to "invalidat[e] . . . the judgment authorizing the prisoner's confinement" only "in part," leaving the conviction intact. *Wilkinson*, 544 U.S. at 83. In this circumstance, the "judgment" that a prisoner challenges in a numerically second petition following resentencing is new only to the extent it replaces the invalidated sentence in the prior judgment.

Contrary to the State's contention, nothing about this reality conflicts with rule recited in *Burton v. Stewart*, 549 U.S. 147 (2007), that "[f]inal judgment in a criminal case means sentence." *Id.* at 156 (quotation marks and citation omitted). That rule determines when a state judgment becomes final for purposes of seeking federal habeas relief. If a state appellate court vacates a sentence *before it ever becomes final* and the trial court imposes a new one, the defendant's judgment does not become final for purposes of seeking federal habeas relief until the new sentence becomes final. *Id.* This finality rule minimizes federal/state friction by ensuring that state-court proceedings run their full course before prisoners may seek relief from federal courts.

This Court, however, has never suggested this finality rule means that federal courts must always treat state-court convictions and sentences as indivisible. To the contrary, when construing 28 U.S.C. § 1257(a), which limits this Court's jurisdiction over state-court decisions to "[f]inal

judgments," this Court has held that convictions and sentences should be treated independently of one another. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). Specifically, when a state court upholds a defendant's conviction but vacates his sentence, the judgment is final as to the conviction. *Id.* The case for independent treatment is even more compelling here, where creating a *Burton*-style indivisibility rule would dramatically increase, not decrease, federal intrusion into state affairs. Every time a federal court granted habeas relief as to a prisoner's sentence, that decision would necessarily vacate the prisoner's conviction as well. That, in turn, would require states in cases such as this to recharge and retry defendants for the underlying crimes themselves. Otherwise, reinstating the defendants' convictions after the grants of habeas relief would violate the Sixth Amendment right to trial by jury and the due process right to present a defense, among other constitutional guarantees. *See, e.g., United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993) ("[A] conviction in the first prosecution [does] not excuse the Government from proving the same facts the second time" in a second prosecution.).

In short, petitioner's recognition of the longstanding practice in habeas law that sentences can (indeed, must) be treated as distinct components of judgments neither contradicts the new judgment principle nor this Court's precedent. It comports with both.

c. Finally, the State argues that treating every claim in a habeas petition challenging a new sentence as a part of a first petition would contradict a "prevailing rule" in the lower courts, a so-called "one

opportunity" rule: "If a claim could have been, or was, raised in a prior habeas petition, it is barred by § 2244(b)(2) and § 2244(b)(1) respectively." Resp. Br. 17, 27-31.[2]

Only one of the cases the State cites, however, is a Section 2254 case, *see Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997), and, contrary to the State's portrayal, it is a perfect illustration of the new judgment principle that petitioner asks this Court to reaffirm. There, a state prisoner who had previously obtained habeas relief limited to his sentence sought to challenge his new sentence. In a short per curiam opinion, the Seventh Circuit held that the petition was not subject to Section 2244 because "a second petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition." *Walker*, 133 F.3d at 455. The court did not pause to consider whether similar claims might have been available against the prisoner's first sentence.

The remaining cases the State cites involve habeas motions challenging new or amended *federal* judgments under 28 U.S.C. § 2255. Section 2255 requires federal courts to review their own judgments

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[2] Here, as elsewhere, the State's locution ignores that it is impossible to raise the same claim against two judgments; raising the identical legal argument against two judgments still raises different claims. *See* Pet. Br. 22-24 & n.9. This locution illustrates the State's failure to come to terms with significance of a new judgment. But for present purposes, petitioner will treat the State as arguing for a rule in which a prisoner's failure to raise an *equivalent* claim against a prior judgment renders him unable to do so against a current one.

"as a further step in the movant's criminal case rather than a separate civil action." Advisory Committee's Note on Rule 1 of the Rules Governing Section 2255 Proceedings in the United States District Courts. This procedural framework allows federal courts not just to invalidate judgments but also to amend or modify them – actions they cannot take when reviewing state judgments. *Id.*; *compare supra* at 4-5 (discussing remedial authority in Section 2254 cases). And when a federal court in a first Section 2255 proceeding orders such limited relief, claim-preclusion issues may arise in subsequent Section 2255 proceedings that simply cannot arise in a second Section 2254 proceeding.

Nonetheless, the State's Section 2255 cases are consistent with the new judgment principle. In each of the decisions in which courts treated petitions following partial grants of habeas relief as successive, the petitions challenged undisturbed components of the original judgments. *See Dahler v. United States*, 259 F.3d 763, 764 (7th Cir. 2001) (habeas relief initially granted as to sentence only; subsequent petition challenging guilt/innocence phase of trial was successive); *Galtieri v. United States*, 128 F.3d 33, 37-38 (2d Cir. 1997) (habeas relief initially granted as to supervised release component of sentence only; subsequent petition challenging conviction and other components of sentence was successive).[3]

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[3] The State also cites two decisions holding that federal habeas motions were successive when the defendants' first such motions obtained reinstatements of their right to appeal (on the

By contrast, when prisoners, as here, who had obtained habeas relief as to their sentences challenged only their new sentences, the courts held the petitions to be first petitions. *See Lang v. United States*, 474 F.3d 348, 353 (6th Cir. 2007) (habeas relief initially granted as to sentence only; subsequent petition challenging new sentence was not successive); *In re Taylor*, 171 F.3d 185 (4th Cir. 1999) (same); *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997) (same).

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ground that their first attorneys provided ineffective assistance by failing to file notices of appeal) and their second motions raised claims not included in their first motions. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 867, 869 (5th Cir. 2000); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997). These decisions accept the general principle that "a numerically second petition is not 'second or successive' if it attacks a different criminal judgment," *Pratt*, 129 F.3d at 60 (internal quotation marks and citation omitted), but hold that a federal court's ministerial act of entering a new judgment identical to the original one in order to enable a timely direct appeal does not trigger the general principle. The State neglects to mention that five federal circuits have ruled otherwise, reasoning that even a ministerial new judgment "resets to zero the counter of collateral attacks pursued." *Shepeck v. United States*, 150 F.3d 800, 801 (7th Cir. 1998); *accord In re Olabode*, 325 F.3d 166, 172-73 (3d Cir. 2003); *McIver v. United States*, 307 F.3d 1327, 1331 (11th Cir. 2002); *In re Goddard*, 170 F.3d 435, 437 (4th Cir. 1999); *United States v. Scott*, 124 F.3d 1328, 1330 (10th Cir. 1997). At any rate, this debate has no relevance here, for even the two circuits in the minority recognize that a petition is not successive where habeas relief results in a full-blown retrial or resentencing, and then the defendant seeks to "attack the new judgment." *Sustache-Rivera v. United States*, 221 F.3d 8, 13 (1st Cir. 2000).

Hence, when the State quotes language from some of these decisions asking questions such as whether the prisoner's claim was "opened by the resentencing," Resp. Br. 28 (quoting *Esposito*, 135 F.3d at 114), the courts were not – as the State would have it – asking whether the prisoner could have challenged his earlier sentence on the same grounds. Rather, the courts were deciding the cases based upon whether the prisoner was challenging a new or old component of his judgment – precisely the inquiry the State seeks to avoid here. *See, e.g.*, *Lang*, 474 F.3d at 351-352 (summarizing this line of cases as holding that "petitions for habeas corpus [a]re not 'second or successive' when the second action challenges a judgment *or portion of a judgment* that arose as a result of a previous successful action") (emphasis added).

2. Neither of the State's alternative proposals for resolving this case withstands scrutiny.

a. The State first suggests that any "numerically second" petition could be deemed automatically successive. Resp. Br. 22-23. The State, however, immediately "acknowledge[s] a problem" with this proposal: This Court's holdings foreclose such a rule. *Id.* Even when a habeas petition challenges the same judgment as a previous petition, the petition is not always "second or successive." *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (petition containing a claim previously dismissed as unripe is a first petition); *Panetti*, 551 U.S. at 943-46 (petition containing a newly ripe claim for the first time is a first petition); *Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000) (petition filed after initial petition

was dismissed for containing unexhausted claims is first petition).

But the problem with the State's proposal runs much deeper than the holdings in *Martinez-Villareal*, *Panetti*, and *Slack*. If all numerically second petitions against *different* judgments were successive, a person who obtained habeas relief could almost never file a subsequent petition challenging a new conviction or sentence on any ground. Even the dissenters in *Martinez-Villareal*, *Panetti*, and *Slack*, therefore, have implicitly recognized that a numerically second rule could not be applied outside of the context of multiple challenges to the *same* state-court judgment. *See Panetti*, 551 U.S. at 964 (Thomas, J., dissenting); *see also Burton*, 549 U.S. at 156 (assuming a petition is not successive when it challenges a "new judgment").[4]

b. After abandoning its own "numerically second" proposal, the State turns to its principal contention. It argues that this Court should fashion an approach for dealing with numerically successive petitions that "steps outside" or "looks beyond § 2244(b)'s plain language." Resp. Br. 23, 55.

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[4] The State also suggests, with the same halfhearted enthusiasm, that habeas petitions could be counted against each occasion of *custody*, rather than each judgment. Resp. Br. 53-54. At least when a prisoner was taken into custody pursuant to a judgment, such a rule would typically be no different than a "numerically second" rule. This is because prisoners do not ordinarily experience a break in custody when they obtain habeas relief and the state reconvicts or resentences them. Nor are prisoners released between serving two prison terms for separate convictions.

Specifically, the State contends that this Court should hold that even when a claim was properly raised and exhausted in state courts, the claim should be barred whenever an equivalent claim "could have been . . . adjudicated in a previous habeas petition." Resp. Br. 26.

There is no justification, however, for "step[ing] outside of" or "look[ing] beyond" the text of AEDPA. The judgment-focused approach to identifying successive petitions *does* comport with the plain text of Sections 2244 and 2254. *See supra* at 9; Pet. Br. 15-18. In cases involving Section 2244, moreover, this Court has consistently recognized – as it has in every other realm of statutory interpretation – that its holdings must "interpret[] AEDPA," not look beyond or ignore its language. *Panetti*, 551 U.S. at 945; *accord Slack*, 529 U.S. at 486; *Martinez-Villareal*, 523 U.S. at 644; *see also Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) ("[T]he fact that the writ has been called an 'equitable remedy' . . . does not authorize a court to ignore this body of statutes, rules, and precedents.") (citation omitted). Accordingly, this Court looks to policy considerations only to the extent that Section 2244 is susceptible to two interpretations and one "reasonable interpretation" of the statute would avoid "distortions and inefficiencies." *Panetti*, 551 U.S. at 943.

The State's "one opportunity" proposal is hardly a "reasonable interpretation" of Section 2244. Under Section 2244(b), courts must apply a two-step analysis to determine whether the writ is being abused. First, they must determine whether a habeas application is "second or successive." Second, if the *application* falls within that category, courts

must then determine whether any of its *claims* are abusive – that is, whether any claims should be dismissed as thwarting AEDPA's goal of streamlining challenges to state-court judgments. This case concerns only the first of those two steps – whether an application under certain circumstances is second or successive. Yet the State proposes to collapse these two steps entirely – that is, to change the statute from one that requires as an initial matter that an *application* be *successive*, into one that goes straight to analyzing whether particular *claims* in every numerically second application are *abusive*.

Put another way, although the State asserts at various points that its proposal is designed to determine whether particular "claims" are "second or successive," Resp. Br. 51, it really advocates erasing the "second or successive" concept entirely from Section 2244. After all, it is a foundational aspect of this case that this is the *first* time that petitioner has raised a due process objection to the State's desire to execute him. It thus is nonsense to say that his *claim* is "second or successive." What the State really argues is that petitioner's claim should be barred precisely because he did *not* previously raise it. In other words, the State proposes transforming Section 2244 from a system of sorting out claims in "successive" petitions into a pure system of waiver that applies to all numerically subsequent petitions.[5]

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[5] The State thus places great weight on the district court's order in petitioner's first federal habeas proceeding directing him to "present all conceivable claims" against his then-existing death sentence. Resp. Br. App. 5a-6a, 12a. That order is

Whatever one might think about the merits or demerits of disregarding the "second or successive application" inquiry and going straight to determining whether claims in all numerically subsequent petitions are abusive according to a pure waiver theory, that is certainly not the system that Congress enacted. This Court has emphasized that the "text" of Habeas Rule 9(b), the predecessor to Section 2244(b), "demonstrate[d]" that the framework for determining whether a claim is abusive "applies *only to 'a second or successive petition.'*" *Slack*, 529 U.S. at 486 (emphasis added); *see also Lonchar*, 517 U.S. at 330 (emphasizing that Rule 9(b) applied only to successive petitions).[6] The same is clearly true respecting Section 2244(b) itself. And Congress had good reason to limit the application of the abuse-of-the-writ doctrine to "second or successive" petitions: This limitation ensures that each prisoner gets one full and fair chance to challenge any state-court judgment under which he is incarcerated. The State's proposal ignores this critical limitation entirely. The State, in fact, does not even try to explain how its proposal could be shoehorned into the language of Section 2244.

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relevant only if the failure to raise a claim against a sentence somehow waives one's ability to raise a similar claim in a *different* case challenging a *subsequent* sentencing judgment.

[6] Prior to AEDPA's enactment, Rule 9(b) stated: "A second or successive petition [alleging new and different grounds] may be dismissed if . . . the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

The State nevertheless claims license from three lines of this Court's cases to create a brand new system for dealing with all numerically subsequent petitions. First, the State notes that *Slack*, *Martinez-Villareal*, and *Panetti* each "focused on the petitioner's opportunity to fully and fairly litigate the claim(s) [at issue] in his previous petition." Resp. Br. 37. In each case, however, this Court carefully stayed within Section 2244's "second or successive application" framework. Each opinion started from the presumption that petitions, such as the ones at issue there, challenging "a state-court judgment already challenged in a prior § 2254 application" are generally successive. *Panetti*, 551 U.S. at 944. But this Court held under the circumstances presented there that the petitions were first petitions (or continuations of first petitions).

To be sure, this Court treated the petitions in those cases as first petitions because the prisoners had not previously been able to litigate the claims therein. But that reasoning is inapposite when a prisoner challenges a *new* judgment for the first time. A prisoner under such circumstances is not challenging "a state-court judgment already challenged in a prior § 2254 application." *Panetti*, 551 U.S. at 944. (It would be impossible for such a prisoner to do so, for a habeas petition must allege "the unlawfulness of a *(not previously invalidated)* conviction or sentence." *Wilkinson*, 544 U.S. at 81 (emphasis added).) Thus, it makes no sense to ask whether such a prisoner had a prior opportunity to challenge the judgment at issue on any particular ground. The judgment did not exist when the prisoner brought his earlier petition.

Second, the State asserts that the "abuse of the writ" doctrine targets "numerically second (or later) petitions containing claims that could have been raised in earlier petitions." Resp. Br. 31-35 (citing *Burton*, 549 U.S. 147; *McCleskey v. Zant*, 499 U.S. 467 (1991); *Delo v. Stokes*, 495 U.S. 320 (1990) (per curiam); *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam); *Wong Doo v. United States*, 265 U.S. 239 (1924); *Salinger v. Loisel*, 265 U.S. 224 (1924)). This line of cases does not help the State either. Each of those cases involved a prisoner's filing repeated applications against the *same* judgment or order.[7] Thus, the applications were obviously successive. This Court asked whether the prisoners had had prior opportunities to raise their claims in order to determine whether the claims were abusive, not to determine whether they were part of successive petitions.

Third, the State argues that this Court's decisions in *Artuz v. Bennett*, 531 U.S. 4 (2000), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), imply that Section 2244 "is a claim-focused statute," in that, in *Pace*'s words, "the 'requirements' of [subsection 2244(b)] are not applicable to the application as a whole; instead they require inquiry into specific claim[s]." Resp. Br. 24. But the statute focuses on specific claims only *once they have been determined*

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[7] To be precise, the prisoners in *Salinger* and *Wong Doo* challenged an arrest warrant and a deportation order, respectively, multiple times. *Salinger*, 265 U.S. at 228-29; *Wong Doo*, 265 U.S. at 239-40.

to be part of a successive petition. And neither *Artuz* nor *Pace* suggests that Section 2244's "second or successive" inquiry itself proceeds on a claim-by-claim basis. To the contrary, this Court emphasized in *Artuz* that the word "application" in Subsection 2244(d) means something different than "claim," 531 U.S. at 10, thereby indicating that the word "application" in Subsection 2244(b) must be given independent meaning as well. *See* Pet. Br. 17-18.

Lest there be any doubt over whether this Court's case law allows (much less requires) the overhaul of habeas procedure that the State advocates, one final point should be dispositive: If a claim is not barred by ordinary res judicata principles, it cannot be barred by habeas law's less preclusive rules respecting subsequent litigation. *See* Pet. Br. 20. Yet, as petitioner has explained, and the State does not dispute, ordinary res judicata law would not bar subsequent litigation under the circumstances here, whereas the system the State proposes would. Pet. Br. 23-24. The State's implicit concession in this respect alone is enough to render its proposal illegitimate.

B. The Eleventh Circuit's Ruling Would Create A Multitude Of Difficulties, None Of Which Exist In The Judgment-Focused Approach To Identifying Successive Petitions.

The State contends that it is "telling" that petitioner relies on hypotheticals instead of real cases to illustrate the troublesome implications of the Eleventh Circuit's holding. Resp. Br. 44. According to the State, this reliance indicates that replacing the

current judgment-focused approach to administering Section 2244(b) with a "one opportunity" regime would not create difficulties. As should be plain by now, however, the reason petitioner used hypotheticals is because, prior to this decision, no court had ever held that a petition challenging a new judgment could be successive. Even the idea of raising such an argument was a stretch – witness, for example, the State's own omission of the issue in the district court, Pet. App. 63a. So the most petitioner can do – apart from pointing to decisions such as this Court's own in *Richmond v. Lewis*, 506 U.S. 40 (1992), in which courts treated claims such as petitioner's as part of first petitions without considering the argument the State makes; *see also* Pet. Reply 4 & n.2 – is to test the State's proposal against various scenarios that regularly arise in habeas cases.

The State's responses to these hypotheticals raise far more questions than they answer. By contrast, neither of the objections the State raises to the new judgment principle creates legitimate concerns.

1. a. Petitioner's opening brief posited the scenario in which a prisoner who previously obtained habeas relief sought to bring a second habeas petition following retrial to challenge his new judgment based on an intervening decision from this Court. Pet. Br. 30-31. This scenario occurs frequently. Consider, for example, prisoners who have received habeas relief over the past several years on grounds unrelated to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Booker v. United States*, 543 U.S. 220 (2005), and now seek to challenge their new sentences based on

those cases. Under current law, this scenario is easily dealt with: a prisoner's *Apprendi* or *Booker* claim is part of a first petition because it challenges a new judgment. Yet the State concedes that if this Court follows its proposal to disregard the benchmark of the specific judgment under attack, "it is not clear how this 'non-retroactive change in the law before retrial' scenario would play out." Resp. Br. 43.

This is a rather ominous admission. Worse yet, the State's suggestion that courts *might* allow a claim based on intervening authority to proceed as one that the prisoner did not have a prior opportunity to raise, *id.*, illustrates the complexities that its proposal raises. Intervening authority is only one scenario in which it would be very difficult to determine whether the prisoner had a "prior opportunity" to raise an equivalent claim the first time around. What if new facts come to light between the two habeas proceedings that make the legal argument much stronger (slightly stronger?) in the second proceeding? What if a claim would have been found procedurally defaulted during the first habeas proceeding, so the prisoner did not raise it, but the issue is cleanly preserved the second time around? What if the prisoner actually raised the argument and did not obtain relief on it – because the district court rejected it – but was unable to seek appellate review or certiorari on the claim because he prevailed on other grounds? *See* NACDL Br. 13-18. This Court would need to develop a whole new jurisprudence to deal with such questions.

b. The State next asserts that, under its proposal, claims that were "previously raised," but

were not adjudicated because the prisoner obtained habeas relief on other grounds could proceed in subsequent habeas petitions because the claims would be treated under *Slack* and *Martinez-Villareal* as part of first petitions. Resp. Br. 42. But even assuming that this Court would be willing to extend the holdings in those cases to treat *any* previously raised, but unadjudicated claim as part of a first petition, it is uncertain how courts would decide whether a claim was, in fact, "previously raised" (an issue that is irrelevant under *Slack*, 529 U.S. at 487-88, and *Martinez-Villareal*, *see Panetti*, 551 U.S. at 944-47). What happens, for instance, if the prisoner raises a claim similar to one raised the first time but that relies on new facts that came to light between the first and second trials? What about a claim that cites new legal authority? What if the claim challenges the same prosecutorial action (such as the introduction of certain evidence), but on different legal grounds? Each of these questions would embroil federal courts in time-consuming litigation, the outcome of which would be uncertain.

One thing, however, *is* certain: The State's proposal would encourage – indeed, require – lawyers filing habeas petitions to fill them up with claims that are procedurally defaulted, foreclosed by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and otherwise hopelessly precluded from generating relief. Such claims, the State would probably be the first to say, impose a needless burden on states and the courts. Yet raising hopelessly precluded claims would be the only way to preserve the ability, if one's client obtained habeas relief on

other grounds, to raise equivalent claims in a future habeas petition.

c. The State's response to petitioner's hypothetical in which the state courts commit the same constitutional violation that triggered habeas relief in the first place, *see* Pet. Br. 31-32, is perhaps the most unsettling of all. Implicitly acknowledging that its proposal would not allow the prisoner to seek habeas relief a second time on the same constitutional basis (because the petitioner would be raising a claim that was raised in a previous petition and thus would be barred under subsection 2244(b)(1)), the State "assume[s]," without providing any citation, "that federal courts will consider a petitioner's claim that the state court violated *due process* by failing to honor the federal court's mandate . . . , thereby allowing the new claim to be raised in a numerically second petition as freshly ripened under the 'one opportunity' rule." Resp. Br. 42 (emphasis added). Suffice it to say that even if federal habeas courts could issue "mandate[s]" to state courts (which they cannot, *see supra* at 4-5), petitioner is not aware of any such due process principle. Indeed, it is generally thought that "[d]ecisions of a lower federal court are no more binding on a state court than they are on a [higher] federal court." *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (quotation marks and citation omitted). If nothing else, the novel due process rule the State imagines is not "clearly established" by this Court, as is required for a state prisoner to seek habeas relief on its basis. 28 U.S.C. § 2254(d)(1).

d. The State's proposal to dispense entirely with a prisoner's specific judgment as the benchmark for measuring whether his petitions are successive raises a final problem. Prisoners are often convicted of two or more crimes at separate trials, resulting in separate judgments. If some prosecutorial tactic, such as introducing a dubiously obtained confession, were common to both prosecutions, and the defendant failed to seek habeas relief on that ground when challenging his first judgment, the State's "one opportunity" proposal implies that he would be barred from raising the issue in a habeas petition challenging his second judgment. This result, however, would be hard to square with Habeas Rule 2(e), which deems "separate petition[s]" covering separate judgments independent of one another.

2. Neither of the State's objections to the judgment-centric approach to the "second or successive" concept withstands scrutiny.

a. The State argues that the new judgment principle allows prisoners to "resurrect[]" previously rejected claims. Resp. Br. 44. But the State does not dispute that *stare decisis* applies in habeas cases to the same extent as any other realm. Resp. Br. 51. So if a prisoner challenges his new conviction or sentence on the same grounds as an earlier, unsuccessful challenge, the decision resolving that earlier challenge has the same controlling effect as any other precedent that resolved a legal issue on identical facts. Pet. Br. 24 n.10. Furthermore, issue preclusion (otherwise known as collateral estoppel) applies to factual findings that were made in an earlier habeas proceeding. Pet. Br. 24 n.10. There is no way, therefore, that a prisoner who was

resentenced could tie up the federal courts with a petition that simply "staple[d] a new cover page" on the petition the prisoner filed against his first judgment, if the non-winning claims were rejected the first time around. Resp. Br. 47.

b. The State also complains that allowing a prisoner to challenge a new death sentence on grounds not raised in a prior, successful federal habeas petition thwarts finality. Resp. Br. 39-41, 46-47. But there is no question that when a resentencing following habeas relief results in a new death sentence, the prisoner may initiate a new round of habeas review. Indeed, the State has never disputed petitioner's ability to pursue the ineffective assistance challenge to his new sentence, on which he prevailed in the district court. Thus, it is quite wrong for the State to blame the new judgment principle for the time this litigation has consumed. Resp. Br. 48.

But the larger point – ultimately the controlling one here – is that whenever a state elects to resentence someone who has obtained habeas relief from a death sentence, comity and finality drop away insofar as the new death sentence the state seeks must comport with constitutional guarantees – *all* constitutional guarantees, regardless of whether they were put into play in prior habeas proceedings. Of course, if the defendant fails to raise constitutional objections during the resentencing proceeding, the state may invoke the procedural default doctrine to prevent litigation of such claims in a subsequent habeas petition. *See, e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). But when, as here, the defendant properly raises and preserves federal constitutional arguments during the new round of

state-court proceedings, the prisoner has the right, if necessary, to initiate a new round of federal habeas review on those grounds. That is the very purpose of Section 2254. And that is all petitioner seeks here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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BILLY JOE MAGWOOD,

Petitioner,

v.

GRANTT CULLIVER, WARDEN, ET. AL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FEDERAL PUBLIC DEFENDERS AND COMMUNITY DEFENDERS, AND THE ASSOCIATION OF FEDERAL PUBLIC DEFENDERS IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice. NACDL's membership includes a number of criminal defense attorneys who have expertise in federal habeas corpus litigation. These NACDL members – whether they are academics, engaged in private practice or employed by state or federal defender organizations – not only provide direct representation in capital and non-capital federal habeas proceedings, but also provide consultation services to and training programs for

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

counsel appointed to represent habeas petitioners in state and federal collateral proceedings.

Because the Court's ruling in this case could impact a significant number of federal habeas petitioners, the appointed Federal Public Defender for every district which has a federal public defender's office or community defender program ("Defenders") join in this filing. The Defenders represent thousands of men and women in federal collateral proceedings brought under 28 U.S.C. §§2254 and 2255. Currently, seventeen, Defender offices have established Capital Habeas Units. Most Defender offices in death penalty jurisdictions handle at least some capital habeas matters.[2] In addition to providing direct representation, Defenders also provide training, consultation, and assistance to Criminal Justice Act practitioners who represent persons in both capital and non-capital 28 U.S.C. §§2254 and 2255 proceedings.

In addition to the Defenders, the National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. §3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work

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[2] Appendix A designates the Chief Federal Defender for each federal district that has a federal public defender or community defender program.

for federal public and community defender organizations authorized under the Criminal Justice Act. The NAFD's membership represents petitioners and movants under 28 U.S.C. §§2254 and 2255, respectively. This experience spans both capital and non-capital cases. One of the guiding principles of the NAFD is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court.

SUMMARY OF ARGUMENT

This Court has previously determined that some second "in time" federal habeas petitions are not "second or successive" petitions governed by the restrictions on such petitions contained in 28 U.S.C. §2244. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930 (2007) (§2244 did not govern a 28 U.S.C. §2254 application raising a newly ripe *Ford v. Wainwright* claim which had not been raised in the first habeas petition attacking the same judgment.); *Slack v. McDaniel*, 529 U.S. 473 (2000) (second-in-time habeas petition was not subject to dismissal where previously filed petition which attacked the same judgment had been dismissed for failure to exhaust); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) (incompetency to be executed claim raised, but dismissed as unripe, in first habeas petition was not subject to dismissal when raised in a second-in-time habeas petition). Because "second or successive" is a "term of

art," *Slack*, 529 U.S. at 486, determining whether a second-in-time petition is a second or successive petition must be gauged by looking at the relevant statutory language and structure, the policies underlying AEDPA, and the "practical effects," *Panetti*, 551 U.S. at 945, of treating a second petition as subject to the limitations of §2244.

In *Burton v. Stewart*, 549 U.S. 147 (2007), this Court held that a habeas petition attacking the same judgment was a second or successive petition. Therefore, because Burton's second federal petition attacked the same 1998 judgment which he previously had challenged in his first federal filing, his second habeas petition was dismissed as second or successive. The "same judgment/different judgment" rule adopted in *Burton* is both sensible and easy to administer. In this case, however, the Eleventh Circuit departed from *Burton*, and deemed Magwood's due process claim subject to dismissal under 28 U.S.C. §2244 because it had not been raised in a prior habeas petition in which Magwood successfully challenged a different state court judgment. If this Court were to adopt the rule utilized by the Eleventh Circuit in Magwood's case, the "'implications for habeas practice would be far reaching and . . . perverse.'" *Panetti*, 551 U.S. at 943, *quoting Martinez-Villareal*, 523 U.S. at 644. Successful habeas petitioners would have to ask federal district and appellate courts to decide moot and unripe claims in advance of their retrials or resentencing proceedings. If they did not do so, or if the federal courts declined

to issue these advisory opinions, the state would be free to repeat even clear constitutional errors, forever exempt from federal review. The only workable rule which will not further prolong and complicate federal habeas litigation is the same principle applied in *Burton*: a second habeas petition attacking a new state court judgment "is to be treated as 'any other first petition' and is not a second or successive petition." *Slack*, 529 U.S. at 487.

ARGUMENT

Billy Joe Magwood was sentenced to death in Coffee County, Alabama in 1981. After exhausting his state remedies, Magwood sought federal habeas review of his conviction and death sentence. The United States District Court for the Middle District of Alabama granted the writ of habeas corpus as to the death sentence, *Magwood v. Smith*, 608 F.Supp. 218 (M.D. Ala. 1985), and the Eleventh Circuit affirmed. *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986). At Magwood's second sentencing hearing, which occurred in 1986, a second judgment of death was imposed. After exhausting available state remedies, Magwood filed a federal habeas petition attacking the 1986 judgment. The District Court granted the writ of habeas corpus, finding that Magwood's new death sentence violated the Due Process Clause. *Magwood v. Jones*, 472 F.Supp. 1333 (M.D. Ala. 2007). Pet. App. 55a. On appeal, however, despite the fact that Magwood was attacking an entirely new judgment of

death, the Eleventh Circuit held that Magwood's due process claim should be dismissed as successive because it was "available at his original sentencing" and thus could have been raised in the prior federal petition in which Magwood successfully challenged the prior 1981 judgment. Pet. App. 15a.

As Magwood has persuasively demonstrated in his brief on the merits, the Eleventh Circuit's decision is fundamentally at odds with this Court's precedent. Furthermore, if this Court embraces the Eleventh Circuit's reasoning in Magwood's case, unfair outcomes will necessarily result; the effects on habeas practice in the federal district courts, federal courts of appeal and this Court will be far-reaching and pernicious; and, several longstanding and accepted aspects of habeas practice and procedure will need to be overhauled.

I. The Eleventh Circuit's Refusal to Acknowledge the Significance of a New Judgment Is Inconsistent with Established Habeas Corpus Practice and Procedure.

The same judgment/different judgment principle for distinguishing between first and second or successive petitions that this Court applied in *Burton v. Stewart*, 549 U.S. 147 (2007), is clear, concise and workable. It is also consistent with this Court's jurisprudence as well as the policies underlying the AEDPA. Magwood's due process claim – the claim at

issue in this case – was raised against a new judgment, one that did not exist at the time he obtained habeas relief from the 1981 death sentence. Rather, the claim arose because, and only because, the state elected to seek a second death sentence. It obtained that new death sentence in 1986. This new sentence created a new judgment because "[f]inal judgment in a criminal case means sentence." *Burton*, 549 U.S. at 156, *quoting Berman*, 302 U.S. at 212. In fact, this Court has held in a number of different contexts that a criminal judgment includes both a conviction and associated sentence. *See, e.g., Teague v. Lane*, 489 U.S. 288, 314, n.2; *Berman v. United States*, 302 U.S. 211, 212-213 (1937).[3]

The significance of the judgment (and of a new judgment) is recognized in both 28 U.S.C. §2244(a) and the Habeas Rules. Section 2244(a) states:

> No circuit or district judge shall be required to entertain an ***application*** for a writ of habeas corpus to inquire into the detention of a person pursuant to a ***judgment*** of a court of the United States if it appears that the legality of such detention has been determined by the judge or court of the United States on a prior application for a writ of

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[3] The Federal Rules of Criminal Procedure also indicate that a judgment includes the sentence. F.R.Crim.P. 32(k)(1) (a judgment "must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence)."

> habeas corpus, except as provided in section 2255.

Id. (emphasis added). Rule 1 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") sets forth the proper scope of a habeas petition, framing a petition in terms of "a person in custody under a state-court judgment," Habeas Rule 1(a)(1), or a "person in custody under a state-court or federal-court judgment." Habeas Rule 1(a)(2). Habeas Rule 2, which sets forth the form of a petition (or application) also uses the "state-court judgment" as its frame of reference. Rule 2 further requires separate petitions for separate state-court judgments: "A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court." *Id.*

This Court has also defined a "claim" in terms of the judgment at issue:

> [I]t is clear that for purposes of § 2244(b) an "application" for habeas relief is a filing that contains one or more "claims." That definition is consistent with the use of the term "application" in the other habeas statutes in chapter 153 of title 28. *See, e.g., Woodford v. Garceau*, 538 U.S. 202 (2003) (for purposes of § 2254(d), an application for habeas corpus relief is a filing that seeks "an adjudication on the merits of the petitioner's claims"). These statutes, and our own decisions, make clear that a *"claim" as used in § 2244(b) is an*

> *asserted federal basis for relief from a state court's judgment of conviction.*

Gonzales v. Crosby, 524 U.S. 524, 530 (2005) (parallel citations omitted) (emphasis added).

Thus, the same judgment/different judgment dividing line is well established in the federal habeas corpus context. An application for habeas relief is directed at one or more state-court judgments. If the habeas petitioner is successful, and the state court judgment is found to be constitutionally defective, then, under most circumstances, the state may seek a new judgment of conviction, or, in a capital case, a new judgment of death. But any subsequent conviction (or death sentence) creates a new judgment which may, should the inmate decide to do so, be challenged again in federal habeas corpus proceedings. The Eleventh Circuit, however, rejected the straightforward same judgment/different judgment principle and treated Magwood's new death sentence as a composition of component parts, as to some of which a new habeas petition was successive and as to some of which it was not. Pet. App. 14a-15a. This idiosyncratic approach is at odds with this Court's precedent and will lead to unnecessary confusion,[4]

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[4] The Court of Appeals purported to derive its analysis from *Galtieri v. United States*, 128 F.3d 33 (2nd Cir. 1997), which rejected a defendant's attempt to file a subsequent §2255 petition challenging his conviction after successfully challenging one part of his sentence – a term of lifetime supervised release – in a first §2255 petition. The *Galtieri* court held that the second

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grossly unfair and irrational results, protective filings and needless appeals. It will also require substantial changes to existing habeas practice.

II. The Reasoning Used by the Eleventh Circuit Would Deprive Deserving Individuals of Federal Habeas Review of Meritorious Constitutional Claims and Would Necessarily Create Confusion Regarding Appropriate Procedures and Practices in Certain Categories of Cases.

Were this Court to adopt the Eleventh Circuit's approach in this case, the federal courts would soon see significant changes in habeas practice. A key driving factor would be §2244's treatment of claims which have been presented in a prior petition. The Eleventh Circuit's reasoning extends not only to claims such as those raised by Magwood in this case, i.e., to claims which were not raised in a first-in-time habeas petition attacking a previous judgment, but also to claims which *were* raised in a prior petition. If a new judgment does not entitle a petitioner to merits review of claims that were not previously raised, then

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petition was barred as successive to the extent it challenged "components" of the original judgment – the death sentence – that *was* disturbed by the first habeas judgment. *See* Pet. App. 15a. Even more puzzling, the decision below said in a footnote that a second petition that was exactly like Galitier's challenging only the conviction after a previous petition successfully challenged only the sentence, *would not* be subject to its preclusive rule. *Id.*, n.4.

it is not clear why a successful petitioner should be entitled to merits review of claims which were raised, but not sustained, in the prior petition attacking the original judgment. The Eleventh Circuit's treatment of Magwood's claim contains no limiting principle that would answer that question. Nor can *amici* discern such a principle. If a new judgment does not wipe the slate clean, thus rendering §2244 inapplicable to claims attacking a new judgment, then AEDPA's limitations on second or successive petitions would apply both to claims which were raised and those which were not. Furthermore, §2244's treatment of "same" claims is even more unforgiving than its treatment of different claims. Indeed, while §2244 does allow federal courts to entertain the merits of claims which were not raised in a first petition under certain *very limited* circumstances, *see, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 319 (1995), there are no exceptions at all in the statute for the review of a claim in a second petition which was previously raised. *See* 28 U.S.C. §2244(b)(1) ("A claim presented in a second or successive habeas application under 2254 that was presented in a prior application shall be dismissed"). Thus, whether Magwood raised the claim in his first petition challenging the original 1981 death judgment is of no moment; had he done so (even if he had done so successfully), by the Eleventh Circuit's construction of §2244, the claim would be barred.

The unfairness of the Eleventh Circuit's rule is easily demonstrated. In fact, as *amici* will

demonstrate, it would in some cases penalize habeas petitioners who had the most diligent and prescient counsel. In the time period between this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Atkins v. Virginia*, 536 U.S. 304 (2002), as the legal landscape began to change, some habeas petitioners presented claims alleging that their death sentence violated the Eighth Amendment because they were mentally retarded. A petitioner who did so, if the Eleventh Circuit's rule is adopted, did so at his or her great peril. If, for example, a post-*Penry*/pre-*Atkins* petitioner alleged both that his trial counsel was ineffective for failing to develop and present evidence that he was mentally retarded and that his death sentence violated the Eighth Amendment because he was a person with mental retardation, he ran the risk of forever losing the right to federal review of his categorical ineligibility claim. If a federal court deemed the ineffective assistance of counsel claim to be meritorious, but rejected, as it surely would have, the mental retardation claim because of this Court's decision in *Penry*, the claim could never again be presented to a federal court in a federal habeas petition. If the same petitioner was then sentenced to death a second time in state court, exhausted available state remedies, and then filed a second habeas petition attacking the second death sentence on the basis that he was ineligible for the death penalty as a result of his mental retardation

(now relying on *Atkins*), the claim would be subject to dismissal as second or successive using the Eleventh Circuit's reasoning.[5]

Thus, the logic of the decision below would create a new category habeas petitioners subject to a new and unique procedural rule that would foreclose them from federal habeas relief on any claim that either was, or could have been, raised in the petition that led to their retrials or resentencings. In petitions brought subsequent to federally ordered retrials or resentencings, that default rule would swallow or preempt other limitations of habeas relief. It would no longer matter whether a petitioner complied with state procedural rules in raising his federal claims at his retrial, or whether the state court ruled on them, or whether those decisions were contrary to clearly established law set down by this Court, or whether this Court's controlling decisions had been made retroactive. All that would matter is that the claims were, or could have been, raised in the petition that led to the retrial or resentencing. Only claims that were raised and finally resolved the first time in the petitioner's favor could be raised again in a subsequent petition challenging the new conviction or sentence.

The only way counsel for a habeas petitioner could have any chance of avoiding that bar would be

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[5] There is no exception for the review of same claims for retroactive new rules. *See* §2244(b)(1).

to continue to press every constitutional issue in a case as far through the federal appellate process as possible, even after a retrial or resentencing is ordered. But it is not at all clear that even that extreme measure would work because of the well-established rule that a party who prevails is not a party aggrieved. *See Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980) ("[O]nly a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. *A party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it.*") (emphasis added); *see also Parr v. United States*, 351 U.S. 513, 517 (1956) ("Only one injured by the judgment sought to be reviewed can appeal. . . .": finding no injury to criminal defendant seeking to appeal the dismissal of his indictment after new indictment had been obtained in alternate jurisdiction).[6]

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[6] In a capital habeas case, for example, if a district court were to grant habeas relief as to one of several sentencing phase issues in the petition, but deny the remaining sentencing claims, the petitioner has no right to challenge the correctness of the district court's decision as to the remaining claims on appeal. If the Warden chose not to appeal the district court's decision, the petitioner would have no right to seek appellate review as he was the prevailing party below. But, if the same petitioner were then re-tried, convicted and sentenced to death, and the exact same constitutional errors occurred at the second sentencing proceeding, when (or if) the petitioner returned to federal court and challenged the second judgment of death in a second federal petition, federal review of the claims would be barred under

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The same result would follow if the district court granted the writ as to one of the claims in the petition but declined to adjudicate the remaining claims on the basis that they were moot. This practice is common in cases where the petitioner prevails on one claim.[7] In the interest of judicial economy, federal

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§2244's same claim rule (as would any and all claims which arguably could have been raised in the first petition challenging the first death judgment and which reoccurred at the second sentencing proceeding).

[7] A review of district court cases from just one jurisdiction – Pennsylvania – reveals how common this practice is. *See e.g.*, *Thomas v. Beard*, 388 F.Supp.2d 489, 516, 530 (E.D.Pa. 2005) (two penalty phase claims "dismissed without prejudice" because relief granted on a different penalty phase claim); *Stevens v. Horn*, 319 F.Supp.2d 592, 595 (W.D. Pa. 2004) ("My disposition of the above-cited claims and the conclusion that a writ of habeas corpus is issued with respect to the death sentences renders it unnecessary to address the remaining sentencing-phase claims."); *Porter v. Horn*, 276 F.Supp.2d 278, 299 (E.D. Pa. 2003) ("Since I have vacated Petitioner's death sentence premised upon Claim V, the aforementioned Claims I, II, IX, X and XI are rendered moot and will not be discussed."); *Henry v. Horn*, 218 F.Supp.2d 671, 686 (E.D. Pa. 2002) ("the petition shall be granted with regard to this claim and Henry's death sentence shall be vacated. Claims II, IV, XI, XII and XIV . . . are rendered moot by my resolution of the first claim and will not be discussed."); *Whitney v. Horn*, 170 F.Supp.2d 492, 503 (E.D. Pa. 2000) ("We conclude that Whitney has successfully established his claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments. As a result, we need not reach his multiple other claims."); *Jermyn v. Horn*, 1998 WL 754567, *19 (M.D. Pa. Oct. 27, 1998) ("[I]f we had not already decided Claim One in Jermyn's favor, we would have held a hearing on this due process issue. However, the issue is moot since we have decided that Jermyn is entitled to a new penalty hearing. If a death sentence is not imposed at that hearing, there will never be a

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courts often choose not to reach the merits of the remaining issues in the petition if the court determines one of the claims has merit. If the state did not appeal, the petitioner would have no right, as the prevailing party, to seek appellate review of the remaining issues. If the same error occurred at the second trial or sentencing proceeding, the claim would be subject to dismissal as second or successive in a second habeas petition challenging the new judgment of conviction or sentence.

In effect, if this Court were to affirm the Eleventh Circuit's dismissal of Magwood's due process claim as second or successive, it would potentially deprive a category of habeas petitioners – those who were successful in their first federal petitions – of federal review of many claims that go to the validity of a new judgment.[8] Doing so would be inconsistent

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need to resolve this issue."). The practice of reserving judgment on mooted claims is also prevalent in cases in which relief is granted or affirmed at the circuit level. *See, e.g., Hamilton v. Ayers*, 583 F.3d 1100, 1102 (9th Cir. 2009) ("Because we grant relief based on the ineffective assistance of counsel claim, we do not reach Hamilton's claim of prosecutorial misconduct at the penalty phase"); *Spears v. Mullin*, 343 F.3rd 1215, 1234 (10th Cir. 2003) ("Because we affirm the grant of relief from Spears' sentence, we need not decide Spears' argument that the failure to sever effected the trial's second stage"); *Lindstadt v. Keane*, 239 F.3d 191, 206 (2nd Cir. 2001) ("Because we grant Lindstadt's motion on an unrelated ground, it is unnecessary to reach the merits of his Confrontation Clause claim").

[8] While the category of persons potentially affected may be relatively small, it is not insignificant. In addition to Magwood, a Westlaw search revealed numerous individuals who sought

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with the manner in which this Court has proceeded in similar contexts. In *Castro v. United States,* 540 U.S. 375, 380-81 (2003), the Court stated:

> Moreover, reading the statute as the Government suggests would produce troublesome results. . . . It would close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent. *Cf. Felker v. Turpin*, 518 U.S. 651, 660-661. And any such conclusion would prove difficult to reconcile with the basic principle that we "read limitations on our jurisdiction to review narrowly." *Utah v. Evans*, 536 U.S. 452, 463 (2002).

Affirming the judgment below will inevitably lead to more work, often for no good reason, for counsel for petitioners, counsel for the state, and for the federal courts. First, as a matter of basic fairness, if

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and obtained habeas relief, and following a retrial or resentencing, again filed a federal petition challenging the new judgment. *See, e.g., Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005); *Moore v. Kinney*, 320 F.3d 767 (8th Cir. 2003); *Kenley v. Bowersox*, 275 F.3d 709 (8th Cir. 2002); *Kenley v. Bowersox*, 228 F.3d 934 (8th Cir. 2000); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Chambers v. Bowersox*, 197 F.3d 308 (8th Cir. 1999); *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir. 1998); *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir. 1990); *Henderson v. Norris*, 118 F.3d 1283 (8th Cir. 1997); *Stockton v. Murray*, 41 F.3d 920 (4th Cir. 1994); *Stockton v. Murray*, 852 F.2d 740 (4th Cir. 1988); *Osborn v. Shillinger*, 997 F.2d 1324 (10th Cir. 1993); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988); *Clabourne v. Ryan*, 2009 U.S. Dist. LEXIS 95838 (D. Az. Sept. 29, 2009).

the Court were to affirm the judgment below, to avoid the unconscionable results discussed above, it would necessarily need to modify the rule that the prevailing party (at least if the prevailing party is a habeas petitioner) cannot appeal. The practice of treating issues as moot when the petitioner prevails on one or more claims would also have to be jettisoned. This would create additional work for the district courts in cases where there was a clearly meritorious issue and it would make appeals much more cumbersome. In fact, counsel for petitioners would be obligated to litigate (or make every effort to litigate) all potentially viable issues at every stage of the litigation, even in cases where their client prevailed on another issue. Why? To attempt to convince a federal court that the remaining issues have merit (and to say so), thus arming counsel at the second state proceeding with the tools to attempt to prevent constitutional error from occurring at the retrial. Using the Eleventh Circuit's reasoning, most issues will be deemed successive in any subsequent federal collateral attack on the new judgment because they either could have been raised or were raised. Thus, counsel for petitioners will be ethically obligated to attempt to obtain a ruling on all issues. This will have a significant impact on practice in the district court, the court of appeals and even certiorari practice in this Court.[9]

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[9] The same effects will be seen in cases where the petitioner prevails and the state does appeal. Under current practice, a

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Finally, if claims are no longer tied to particular judgments, as is the case with the Eleventh Circuit's reasoning in *Magwood*, then how does a court distinguish between: a) claims that were available but not previously raised; b) claims that were not available; and, c) claims that were previously raised? Consider the following scenario The habeas petitioner prevailed on his claim that the prosecutor's closing argument at the sentencing phase of his capital trial violated the Due Process Clause. But, the federal court rejected his claim that counsel was ineffective in investigating, developing and presenting mitigating evidence. At the resentencing proceeding, trial counsel presented the exact same case in mitigation that was presented at the first trial. The client is again sentenced to death. If the petitioner subsequently seeks federal habeas review of his second death sentence, is this same claim that was raised in the first petition (and thus subject to dismissal as successive)? Yes, it goes to a new judgment, but so did Magwood's claim. What if the ineffective assistance of counsel claim had not been raised in the first habeas petition? Would it be subject to dismissal on the basis that it could have been raised but was not? It is true that the claim is challenging a second death sentence,

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petitioner might reasonably decide not to cross-appeal depending on counsel's assessment of the strength of the likelihood of the district court's decision being affirmed on appeal. But, if this Court were to affirm the judgment below, counsel would, for the reasons described above, be required to litigate all potentially viable issues via a cross-appeal.

but the factual basis of the claim is more or less the same. Once the same judgment/different judgment principle is jettisoned, the lines between claims which have been previously adjudicated, those which have not, and those which could have been raised, become hopelessly blurred.

III. The Reasoning Utilized by the Eleventh Circuit in Magwood's Case Will Create Confusion Regarding the Limitations Period and Will Result in Additional Filing of "Mixed" Petitions.

In *Burton*, this Court held that the statute of limitations runs from the date of the sentencing judgment. The underlying rationale of the Eleventh Circuit's opinion in *Magwood* is that Magwood's due process claim was challenging an amended judgment, not a new judgment. If it were true that Magwood's judgment were merely amended, then Magwood's entire habeas petition would be untimely because his original sentence became final in 1981. Moreover, the imprecise line between a new judgment and an amended judgment would create additional confusion in an already murky and heavily litigated area of habeas jurisprudence. *See, e.g.*, *Reber v. Steele*, 570 F.3d 1206, 1209-10 (10th Cir. 2009) (following *Burton*, holds that habeas petition prematurely filed because sentence was not final at time of filing); *Phanhmixay v. Robert*, 298 Fed. Appx. 830, 830-32 (11th Cir. 2008) (district court erred by not calculating limitations period from date of resentencing,);

Robbins v. Sec'y, DOC, 483 F.3d 737, 738 (11th Cir. 2007) (judgment not final until time for appealing resentencing expires, even when subsequent habeas petition challenges only the conviction and not the sentence); *United States v. Messervey*, 269 Fed. Appx. 379 (5th Cir. 2008) (when a conviction is affirmed on appeal but the case is remanded for resentencing, the conviction becomes final for limitation purposes under AEDPA "when both the conviction and sentence become final."); *United States v. LaFromboise*, 427 F.3d 680, 682 (9th Cir. 2005) (conviction was not final and statute of limitations did not begin to run until an amended judgment was entered and defendant was resentenced); *United States v. Dodson*, 291 F.3d 268, 272 (4th Cir. 2002) (judgment of conviction not final for Section 2255 purposes until both conviction and sentence final); *United States v. Outen*, 286 F.3d 622, 631-32 (2nd Cir. 2002) (because defendant's appeal was in abeyance, Section 2255 statute of limitations never began to run).

Thus, if this Court were to affirm the judgment below, *Burton*'s bright line rule that the limitations period does not begin to run until both the conviction and sentence are final, 549 U.S. at 156, would be eroded. *Amici*'s members, for example, would be compelled in some cases to advise counsel for a death-sentenced inmate who prevailed in state post-conviction on a sentencing phase claim, to file a federal habeas petition prior to any additional state court proceedings. Given the inherently vague nature of the difference between an amended judgment and a new

judgment, it would be malpractice in many cases to complete the state court proceedings before filing a federal habeas petition. These protectively filed petitions would in many cases contain not only claims challenging the conviction (as the judgment of conviction was affirmed), but also any and all sentencing phase issues (even though the inmate was no longer under a sentence of death). Failing to do so, could potentially deprive the petitioner of federal review of all claims, because if a new death sentence is determined to be merely an amendment of the prior sentence, then the limitations period was never tolled. As absurd as this may sound, and as inefficient as it may be to flood the courts with what would appear to be mixed petitions,[10] until numerous additional questions are answered, a decision of this Court affirming the judgment below would necessarily create limitations period confusion.

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[10] In *Mohawk Industries, Inc. v. Carpenter*, No. 08-678, 130 S.Ct. 599 (Dec. 8, 2009), a group of retired Article III judges filed an *Amicus Curiae* brief in support of the respondent, Norman Carpenter. In their submission, the Article III judges described the near-crises facing the federal courts due to crushing caseloads and limited resources. It would not seem to be in anyone's interest to add additional cases to federal dockets that will in many instances languish for years while additional litigation is ongoing in the state courts.

IV. A Decision in Magwood's Favor Will Not Encourage Strategic Withholding of Meritorious Claims.

In the brief-in-opposition, Respondent claimed that if this Court were to reverse the judgment below, habeas petitioners would be encouraged to strategically withhold meritorious claims and save them, if needed, for a return trip to federal court. BIO at 18. Such an approach is neither strategically sound nor consistent with effective representation by collateral counsel. Collectively, *Amici*'s members have represented hundreds, if not thousands, of capital and non-capital habeas petitioners. They have consulted in literally hundreds of other habeas cases. The idea that one would forego a valid issue on the outside chance that another claim in the petition will yield a favorable result is not strategically sound in any respect.

Given the vagaries of federal habeas litigation, and the existing obstacles to obtaining federal habeas relief (*e.g.*, the statute of limitations, procedural default, non-retroactivity and §2254(d)'s limitation on relief), no litigant would strategically "sandbag" on an issue of merit or fail to include a potentially viable claim in a federal habeas petition as "insurance" against an adverse result at a new trial or sentencing hearing. Sandbagging, under any circumstances is a bad gamble. To hold back a potentially winning issue in a habeas petition, much less a capital habeas petition, on the set of assumptions that: a) the petition will succeed on another ground; b) the undisclosed error will be repeated at a retrial; c) the state courts

will act unreasonably in failing to recognize and correct the error; but, d) the federal courts will do so in a second petition, is such a longshot and foolhardy that no competent lawyer would do it.

In any event, there is no indication that anything like this is happening in capital habeas cases generally, or that anything like that happened in this case. Indeed, the Court of Appeals below held that it was understandable and excusable that, as late as the resentencing, Magwood's lawyers accepted that the "fair warning" argument "ha[d] already been decided adversely to his client's position by a state's highest court. . . ." Pet. App. 20a. If it was not ineffective for Magwood's trial lawyers to have accepted this aspect of the state court decision even at the resentencing, surely it cannot be assumed to have been abusive for his first habeas lawyers to have done the same thing in the stage of the case that went just before.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers, the Federal Public Defenders and Community Defenders, and the National Association of Federal Public Defenders, support Magwood's request that the judgment of the Eleventh Circuit Court of Appeals be reversed.

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AMICUS CURIAE BRIEF

No. 09-158

In the Supreme Court of the United States

BILLY JOE MAGWOOD,
Petitioner,

v.

TONY PATTERSON, WARDEN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF SOUTH CAROLINA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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(CAPITAL CASE)
QUESTION PRESENTED

When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment part of a "second or successive" petition under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?

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28 U.S.C. § 2244(b) . . . . . *passim*

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INTEREST OF THE AMICI CURIAE STATES

The *Amici* States are charged with the responsibility of preserving criminal convictions, a substantial number of which are eventually reviewed in federal habeas. *Amici* therefore have a significant interest in this case, which will determine whether the limits Congress imposed on "second or successive" habeas petitions in the Antiterrorism and Effective Death Penalty Act (AEDPA) will have their intended effect. The "abuse of the writ" doctrine has long barred habeas petitioners from asserting claims they could have, but did not, raise in prior habeas petitions. That doctrine serves many important state interests, including promotion of timely challenges and finality. Congress incorporated the abuse of the writ doctrine in 28 U.S.C. § 2244(b), and imposed additional limits making it still more difficult for prisoners to assert second or successive petitions. This Court's construction of that provision in this case will affect the States' interests long served by that doctrine and by AEDPA.

SUMMARY OF ARGUMENT

Building on the "abuse of the writ" doctrine, Congress severely limited "second or successive" habeas litigation in 28 U.S.C. § 2244(b). At issue is how that provision applies to a federal habeas petition filed after a resentencing that resulted from a prior habeas action. Magwood argues that this numerically second petition should be considered a first because it is his first habeas challenge to the new judgment. Accordingly, he asserts, none of the claims challenging the sentence are subject to the strictures of Section 2244(b) – even though he could have asserted his fair-

warning claim in his prior habeas petition. Magwood's argument thereby treats claims that newly arose during resentencing the same as claims that could have been asserted in the prior petition. That approach cannot be reconciled with this Court's past treatment of Section 2244, with Section 2244(b)'s roots in the abuse of the writ doctrine, and with longstanding practice in the lower courts.

1. Magwood errs in contending that the "second or successive" inquiry can only be conducted by counting the number of applications against some benchmark, as opposed to assessing the abusiveness of the claims. Section 2244(b) is properly applied on a claim-by-claim basis. In *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), this Court observed that Sections 2244(b) and (d) look both to applications and to the claims, and noted that courts should engage in "claim-by-claim consideration." The Court confirmed this approach to Section 2244(b) in *Panetti v. Quarterman*, 551 U.S. 930 (2007), where it held that a competency-to-be-executed claim was not second or successive because it could not have been fairly presented in a prior petition – even though the claim was presented in a numerically second petition challenging a sentence of death. In the end, not even Magwood truly defends an application-focused approach that ignores the claims, for he concedes that claims challenging his underlying conviction would be barred.

2. Under a claim-by-claim approach, a claim is second or successive if it was previously raised or was available but not raised in a prior petition. That standard precisely tracks the abuse of the writ doctrine, which this Court has observed is the source of Section 2244(b). Moreover, the objectives of Section

2244(b) – the States' interests in finality, preserving resources, bring closure to victims, limiting the passage of time before retrials, and limiting the federal intrusion on state efforts to punish wrongdoers – are served by construing Section 2244(b) as barring claims that could have been, but were not, previously raised. All of those interests would be undermined if Magwood's construction of Section 2244(b) were adopted.

3. The many circuits that have addressed this issue have applied a claim-by-claim approach that distinguishes between claims that newly arose during resentencing and claims that were, or could have been, raised in the prior petition. There is no basis to believe that the hypothetical problems Magwood and his *amici* posit justify the creation of an exception to the longstanding rule that claims are abusive when they could have been raised previously and were not. In the end, the critical point is this: Magwood could have raised his fair-warning claim in his first petition, filed in 1983. He therefore abused the writ when he raised it in his 1997 petition. Accordingly, that claim was "second or successive" within the meaning of Section 2244(b).

ARGUMENT

A Claim Raised in a Habeas Petition Following Resentencing That Could Have Been, but Was Not, Raised in a Prior Habeas Petition Is "Second or Successive" under 28 U.S.C. § 2244(b).

Congress enacted AEDPA to encourage the "expeditious handling of habeas proceedings,"

"finality," "federalism," and "comity." *Day v. McDonough*, 547 U.S. 198, 208 (2006); *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau* 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Undertaking its acknowledged task to define "the proper scope of the writ" through legislation, *Felker v. Turpin*, 518 U.S. 651, 664 (1996), Congress streamlined habeas practice and encouraged prompt litigation of claims, preferably in one petition. *Duncan*, 533 U.S. at 167. Section 2244(b)'s limitations on the filing of "second or successive" habeas petitions is one of the principal means by which AEDPA accomplished those objectives. Magwood's position, however, would rob the provision of much of its vitality, and allow the assertion of myriad claims that could have been, but were not, raised in prior petitions — precisely the sort of claims long understood to be abuses of the writ.

A petition following resentencing can be treated under Section 2244(b) in one of four ways: (1) under a plain language approach that asks only whether the prisoner had filed "a prior application"; (2) on an "application-focused basis" that looks to whether the second application is challenging the same *custody* as the prior application; (3) on an "application-focused basis" that looks to whether the second application is challenging the same *judgment* as the prior application; or (4) on a "claim-by-claim basis" that looks to whether individual claims were asserted in the prior petition, or could have been but were not.

As we explain below, only option (4) is consistent with both the language of Section 2244(b) and Congress' objectives. A resentencing constitutes the continuation of a proceeding that has been ongoing for

years. Decisions made by the many courts (state and federal, trial and appellate) along the way are not eradicated by the habeas ruling requiring resentencing. The claim-by-claim approach (what Respondents call the "one opportunity" rule) recognizes that, as a result, not all claims following resentencing are of the same nature. Some claims newly arise during the resentencing, and are therefore not barred by Section 2244(b). One example is an ineffective assistance of counsel claim based on performance at resentencing. Other claims, however, have already been definitively disposed of in prior proceedings or could have been had the petitioner raised them. These claims *are* "second or successive." For example, Magwood could have challenged his eligibility for the death penalty at his first sentencing proceeding, and nothing occurred between then and his second sentencing proceeding that affected the claim in any way. Such a claim should be barred as successive. Section 2244(b) can properly be applied only by looking at the individual claims and assessing which category they fall into based upon the full record.[1]

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[1]Respondents would prevail if the Court adopted either option (1) or (2). Option (1) asks only whether the prisoner had filed "a prior application." Magwood, of course, did file a prior application. Option (2) asks whether the second application is challenging the same custody as the prior one. The habeas petition at issue is Magwood's second petition relating to his custody for the murder of Sheriff Grantham. As Respondents argue (Br. 20), the literal language of Section 2244(b) supports option (1); and option (2) is at least as consistent with the statutory language as option (3), Magwood's proposed rule, and better serves Congress' objectives. Nonetheless, as Respondents further

A. Section 2244(b) applies on a claim-by-claim basis.

1. Section 2244(b) requires the dismissal of any "claim presented in a second or successive habeas corpus application" unless the "claim . . . was not presented in a prior application," the claim is based on new facts or new retroactive law, and the petitioner can establish his actual innocence of the underlying crime. According to Magwood, this language "requires courts to decide whether a habeas 'application' is successive," and that there is "no statutory authority to" assess whether "any particular 'claim' . . . is somehow 'second or successive.'" Pet. Br. 18. In *Pace v. DiGuglielmo*, 544 U.S. 408, 415-16 (2005), however, this Court rejected a strikingly similar contention.

At issue in *Pace* was whether an application for state post-conviction relief was "properly filed," and therefore tolled AEDPA's one-year limitations period, when the state court rejected the application as untimely. This Court stated:

> Petitioner also argues that, because §2244(d)(2) refers to a "properly filed *application*," then any condition that must be applied on a claim-by-claim basis, such as Pennsylvania's time limit, cannot be a "condition to filing." (Emphasis added.) Section 2244, however, refutes this position. Section 2244(b)(3)(C), for example, states

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note (Br. 20-23), and as argued below, the claim-by-claim approach, option (4), is more consistent with this Court's decisions construing Section 2244(b) and related provisions.

> that the court of appeals "may authorize the filing of a second or successive *application* only if it determines that the *application* makes a prima facie showing that the *application* satisfies the requirements of this subsection." (Emphases added.) Yet the "requirements" of the subsection are not applicable to the application as a whole; instead, they require inquiry into specific "claim[s]." See §2244(b)(2)(A) ("claim" relies on a new rule made retroactive); §2244(b)(2)(B) ("claim" with new factual predicate).

Id. (internal footnote omitted). The Court added that the same was true with respect to Section 2244(d)(1), which

> provides that a "1-year period of limitation shall apply to an *application* for a writ of habeas corpus." (Emphasis added.) The subsection then provides one means of calculating the limitation with regard to the "application" as a whole, §2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, §2244(d)(1)(B) (governmental interference); §2244(d)(1)(C) (new right made retroactive); §2244(d)(1)(D) (new factual predicate).

Id. at 416 n.6.[2] Likewise, in *Mayle v. Felix*, 545 U.S.

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[2] Magwood, like the dissent in *Pace*, asserts that *Artuz v. Bennett*, 531 U.S. 4 (2000), requires a different result, namely, an application-by-application assessment. *See* Pet. Br. 17, 18 (citing *Artuz*); *Pace*, 544 U.S. at 423-24 (Stevens, J., dissenting). The majority opinion in *Pace*, however, which Magwood never cites, definitely rejected that reading

644, 659 (2005), the Court held that a claim in an amended habeas application did not "relate back," and thereby avoid AEDPA's one-year time limitation, when it did not arise out of the same "core of operative facts" as claims in the original complaint. This Court rejected the argument that the claim was not barred simply because it arose from "the habeas petitioner's trial, conviction, or sentence." *Id.* at 657. Once again, application of the limitations period in Section 2244(d)(1) was assessed on a claim-by-claim basis even though the statute provides that the period "shall apply to an *application* for a writ of habeas corpus" (emphasis added).

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court confirmed that Section 2244(b) is properly applied by assessing whether claims, not applications, are second or successive. Panetti's habeas petition asserting his competency-to-be-executed claim was indisputably his second habeas petition challenging the judgment under which he was convicted and sentenced to death. If Magwood's reading of Section 2244(b) were correct, this Court would have found that Panetti's second habeas petition was a "second or successive" application. At that point, "the Section provides rules for determining whether each individual 'claim' in the application may go forward" (Pet. Br. 18), which, when applied to Pannetti's competency-to-be-executed claim, would not have allowed the application to go forward because the claim does not establish actual innocence of the underlying offense.

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of *Artuz*.

The Court instead asked a different question: whether Panetti had a prior opportunity to assert his competency-to-be-executed claim. Because he did not have a prior opportunity to assert that claim, given that such a claim is not ripe until the execution is imminent, the bar of Section 2244(b) did not apply to his numerically second habeas petition. *Panetti*, 551 U.S. at 945-46. The critical factor was whether there was an abuse of the writ by repeated presentation of claims, or the failure to present past available claims — not whether the application as a whole was the numerically second one as measured against some benchmark (be it a judgment or custody).

2. Moreover, Magwood himself recognizes that a claim-by-claim, not application-by-application, inquiry is necessary. In an aside, Magwood states, "Of course, when a prisoner, such as petitioner, obtains habeas relief from his sentence, but not his conviction, any habeas petition after his resentencing that challenged his *conviction* would be successive." Pet. Br. 21 n.8. In other words, even though the application would be the petitioner's first following his new judgment, it would be "second or successive" because of the content of the claim within the application. We agree with that result, but do not see how it can be squared with Magwood's theory of the case, under which his petition's status as the first to challenge his new judgment ends the "second or successive" inquiry altogether.

Nor does Magwood tell us what result would obtain if the habeas petition filed after resentencing contained one claim that challenged his conviction and

another based on an issue that first arose at resentencing. We presume Magwood would contend that the new sentencing claim could proceed, but that the claim related to his conviction would be barred as second or successive. The application of Section 2244(b) must necessarily depend on the *claims* contained in the post-resentencing application. Simply determining whether an *application* was the first or the second challenging a particular judgment would not suffice.

B. Claims that could have been, but were not, raised in a prior petition abuse the writ and are therefore "second or successive" within the meaning of Section 2244(b).

Once Section 2244(b) is held to apply on a claim-by-claim basis, a simple rule follows: claims that originated in resentencing are not "second or successive"; claims that were raised, or could have been raised, in the prior habeas petition that led to the resentencing are "second or successive." That rule flows directly from this Court's recognition in *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), that the "phrase 'second or successive petition' is a term of art given substance in [the Court's] prior habeas corpus cases." Those prior cases establish that the phrase developed as an outgrowth of the "abuse of the writ" doctrine, and has invariably encompassed claims that could have been, but were not, presented in prior habeas petitions.

1. In *McCleskey v. Zant*, 499 U.S. 467, 479 (1991), the Court explained that the abuse of the writ doctrine

developed because, "[a]s appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive petitions." The Court first applied the doctrine in *Wong Doo v. United States*, 265 U.S. 239, 241 (1924), where it denied a second petition because the claim it raised was available in his first action (indeed, it was raised but then abandoned). The Court reasoned that "the petitioner had full opportunity to offer proof of it at the hearing on the first petition, and, if he was intending to rely on that ground, good faith required that he produce the proof then." *Id.*

Discussing these early abuse of the writ cases, the Court in *Sanders v. United States*, 373 U.S. 1, 8 (1963), coined the phrase "second or successive application" to refer to petitions that raise claims the petitioner raised, or could have raised, in a prior petition. Although aspects of the abuse of the writ doctrine changed over time, one component did not change: "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first." *McCleskey*, 499 U.S. at 489 (citing *Delo v. Stokes*, 495 U.S. 320, 321-22 (1991); *Antone v. Dugger*, 465 U.S. 377 (1984); *Woodard v. Hutchins*, 464 U.S. 377 (1984)). A petition containing such a claim is a second or successive application.

By contrast, this Court has held that a petition was not "second or successive," *i.e*, the writ was not abused, when the prisoner did not have the opportunity to raise the claim in his prior petition(s). For example, as

discussed earlier, in *Panetti*, this Court held that a prisoner's numerically second petition asserting a competency-to-be-executed claim was not second or successive. 551 U.S. at 943-44. Observing that "[t]he phrase 'second or successive' is not self-defining" but "takes its full meaning from our case law, including decisions" before AEDPA's enactment, *id.* at 943, the Court concluded that Panetti did not abuse the writ because "claims of incompetency to be executed remain unripe at early stages of the proceedings," and therefore were not available when he filed his prior petition. *Id.* at 947.

2. Construing Section 2244(b) as generally barring the assertion of claims that were raised, or could have been raised, in a prior petition serves the policies underlying the abuse the writ doctrine, which drove Congress to enact AEDPA generally and Section 2244(b) specifically.

In *McCleskey*, the Court set out an array of interests furthered by the abuse of the writ doctrine. Federal habeas litigation "frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." 499 U.S. at 467 (internal quotation marks and citations omitted). In addition, "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *Id.* Moreover, "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.* at 467-68. All of these concerns are "[f]ar

more severe . . . when a claim is presented for the first time in a second or subsequent federal habeas petition." *Id.* at 468.

The "ordeal of" extending the "trial for both society and the accused . . . worsens during subsequent collateral proceedings." *Id.* "[E]xamination of new claims raised in a second or subsequent petition spreads [resources] thinner still." *Id.* "And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *Id.* Moreover, the "[p]assage of time, erosion of memory, and dispersion of witnesses [that] may render retrial difficult, even impossible," *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982), only increase when claims are asserted years after they first could have been asserted. The abuse of the writ doctrine attempts to combat those problems.

All of these problems would arise if Magwood's position were adopted. Petitioners, upon resentencing, would have free reign to assert claims they could have, but did not, raise in their first petition. It blinks at reality to believe Congress intended that result when it adopted AEDPA and Section 2244(b). Congress enacted AEDPA to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). To help accomplish that objective, Section 2244(b) "codified some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners." *Felker*, 518

U.S. at 664. Construing Section 2244(b) to permit the assertion of claims that could have been raised in a prior petition cannot be reconciled with that understanding of the provision.

Moreover, the negative consequences of such a construction could not be limited to capital cases. Section 2244(b) applies equally to capital and non-capital cases. Although capital prisoners have the greater incentive to delay, non-capital prisoners, logically, would also try to take second, third, and fourth bites at the apple, if given the opportunity.

C. Current practice in the lower courts supports the "one opportunity" rule.

As Respondents show, Br. 25-28, eight circuits have addressed post-resentencing habeas petitions filed by petitioners who had received sentencing relief based on a prior habeas petition. All have distinguished between applications whose claims newly arose during the resentencing and those whose claims could have been asserted in the prior petition. Magwood presents no evidence suggesting that this approach has been difficult to apply or has created any "perverse" consequences. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998), *quoted in Panetti*, 551 U.S. at 943.

The best that he and his *amici* could come up with are hypotheticals where this Court adopted new rules after the prisoner's first trial, but before his resentencing (or retrial). *See* Pet. Br. 30-31 (hypothetical *Crawford* claim); NACDL Br. 12-14

(hypothetical *Atkins* claim). As Respondents note, however, should this issue actually arise, habeas courts might conclude that these claims were not genuinely available (there was not a full and fair opportunity to litigate them) prior to this Court's announcement of the new rules. *See* Resp. Br. 42. Under pre-AEDPA case law, they would not have been considered abuses of the writ. Accordingly, they would not be second or successive under the "one opportunity" rule. Moreover, many claims of that sort would be genuinely new claims because they would arise in the context of an entirely new trial, where new evidence and testimony are presented. And at the very least, the claims may be asserted on direct review and can be presented to this Court, as is the case with Fourth Amendment claims — just not in another round of habeas. *See Stone v. Powell*, 428 U.S. 465 (1976) (Fourth Amendment exclusionary rule not cognizable on federal habeas review).

Magwood's *amici* also contend that affirmance of the Eleventh Circuit holding would "create additional confusion in an already murky and heavily litigated area of habeas jurisprudence," to wit, "the imprecise line between a new judgment and an amended judgment." NACDL Br. 20. The widely applied "one opportunity" rule, however, does not depend on that "imprecise line." The only issue is whether one or more claims within the numerically second application were raised and decided in the prior application or were not raised even though the petitioner had the opportunity to raise them. That is an inquiry habeas courts have been engaging in for as long as the abuse of the writ doctrine has existed.

Nor does our position "erode[]" "*Burton*'s bright line rule that the limitations period does not begin to run until both the conviction and sentence are final." NACDL Br. 21. The "one opportunity" rule accepts *Burton*'s definition of "judgment," and does not contest its statement that "Burton's limitations period did not begin until both his conviction and sentence 'became final by the conclusion of direct review or the expiration of the time for seeking review.'" *Burton v. Stewart*, 549 U.S. 147, 156-57 (2007). When the limitations period begins to run, however, has no bearing on whether a claim or application is second or successive. Adoption of the "one opportunity" rule will have no bearing on whether habeas counsel should, or should not, file "protective[]" petitions (NACDL Br. 22) out of fear that the limitations period will expire during the course of additional state post-conviction proceedings.

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All told, the "one opportunity" rule represents a sensible and workable reading of Section 2244(b) that avoids the extremes of barring or allowing *all* claims contained within post-resentencing petitions while remaining faithful to Congress' intent and the history of the abuse of the writ doctrine.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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